Supreme Court, U. S.
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[K-78]

In The

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-2034

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ETHEL CALDWELL, individually and on behalf of all other persons similarly situated,

Respondent,

and

ELLA MC CULLOUGH, JANET RICHMOND, AGNES GRANT and MURIEL ROTHSTEIN, as next friend of BELLE BARNETT, individually and on behalf of all other persons similarly situated,

Respondents,

and

[OVER]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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State of New York
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JAMES L. COVERT, as Commissioner of the Madison County Department of Social Services, MADISON COUNTY, NEW YORK, JOHN L. LASCARIS, as Commissioner of the Onondaga County Department of Social Services, ONONDAGA COUNTY, NEW YORK, JOSEPH P. MENALDINO, as Commissioner of Warren County Department of Social Services, WARREN COUNTY, NEW YORK, ROBERT E. LAUNDREE, as Commissioner of the Essex County Department of Social Services, ESSEX COUNTY, NEW YORK, GABRIEL T. RUSSO, as Commissioner of the Monroe County Department of Social Services, MONROE COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ANITA PERITO and JAMES PERITO, individually and on behalf of all others similarly situated,

Respondents,

and

LOUIS FRIEDMAN,

Respondent,

and

BLANCHE BERNSTEIN, individually and as Commissioner of the New York City Department of Social Services,

Respondent.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

JENNIE LANDERS,

Respondent,

and

JOSEPHINE MANICCIA,

Respondent,

and

DAVID R. ADINOLFI, as Commissioner of the Cortland County Department of Social Services, CORTLAND COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

JULIA WHITLOCK,

Respondent,

and

ROBERT WAGNER, as Commissioner of the Tompkins County Department of Social Services, TOMPKINS COUNTY, NEW YORK,

Respondents.

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OCTOBER TERM, 1979

NO.

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

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v.

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Respondent,

and

ELLA MC CULLOUGH, JANET RICHMOND, AGNES GRANT and MURIEL ROTHSTEIN, as next friend of BELLE BARNETT, individually and on behalf of all other persons similarly situated,

Respondents,

and

JAMES L. COVERT, as Commissioner of the Madison County Department of Social Services, MADISON COUNTY, NEW YORK, JOHN L. LASCARIS, as Commissioner of the Onondaga County Department of Social Services, ONONDAGA COUNTY, NEW YORK, JOSEPH P. MENALDINO, as Commissioner of Warren County Department of Social Services, WARREN COUNTY, NEW YORK, ROBERT E. LAUNDREE, as Commissioner of the Essex County Department of Social Services, ESSEX COUNTY, NEW YORK, GABRIEL T. RUSSO, as Commissioner of the Monroe County Department of Social Services, MONROE COUNTY, NEW YORK,

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BLANCHE BERNSTEIN, individually and as Commissioner of the New York City Department of Social Services,

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JENNIE LANDERS,

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JOSEPHINE MANICCIA,

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BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

JULIA WHITLOCK,

Respondent,

and

ROBERT WAGNER, as Commissioner of the Tompkins County Department of Social Services, TOMPKINS COUNTY, NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Barbara Blum, as Commissioner of the New York State Department of Social Services, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 16, 1980.

Opinions Below

The decision and order of the District Court for the Northern District of New York (HOWARD G. MUNSON, D.J.), dated November 29, 1979, which *inter alia* certified a class and preliminarily enjoined "* * * the defendants from enforcing [New York] Social Services Law §366.1(e), 18 N.Y.C.R.R. [New York Code of Rules and Regulations] 360.8 * * * with regard to plaintiffs during the pendency of these actions" is set forth as Appendix "A".* It is not yet reported.

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*Numbers hereafter appearing in parentheses preceded by the letter "A" refer to pages in the Appendix.

The opinion for affirmance of the Court of Appeals dated April 16, 1980 is set forth as Appendix "B" and is not yet reported. Although the opinion of the Court of Appeals addresses the issuance of a "preliminary injunction", the issuance of such injunction by the District Court did not rest upon any disputed question of fact which might be resolved differently upon a further hearing, and the opinion of the Court of Appeals finally determines the legal issues raised by this action. The issuance of a permanent injunction with respect to the legal issues raised, therefore, appears to be a mere formality (see *Organization For a Better Austin v Keefe*, 402 US 415, note at 418 [1971]).

Questions Presented

1. Is not HEW's interpretation of the comparability provision contained in 42 USC §1396a (a) (10) (C) (i) with respect to the State's transfer-of-assets prohibition irrational, since HEW does not disapprove of transfer prohibitions in themselves and there is no rational correlation between allowing persons to transfer property for the purpose of qualifying for SSI and allowing them to transfer property for the purpose of qualifying for medical assistance?

2. Is not HEW's position, as expressed in its regulation 42 CFR §435.401(c), that 42 USC §1396a (a) (10) (C) (i) precludes New York from enforcing its transfer-of-assets prohibition as to the medically needy, unauthorized by Title XIX of the Social Security Act, since the State's prohibition constitutes a complementary eligibility standard consistent with the broad objectives of Title XIX, and there is no clear manifestation of congressional intent to preempt such prohibitions?

Statutes and Regulations Involved

42 USC §1396a (a) (10) (C) (i), 42 CFR §435.401(c), New York Social Services Law, §366.1(e) and 18 NYCRR §360.8 are set forth in pertinent part in Appendix "C".

Jurisdiction

The jurisdiction of this Court to review the case on petition for certiorari rests upon 28 USC §1254(1).

Statement of Case

Plaintiffs,* plaintiffs-intervenors and members of the class include aged, blind and disabled persons who although categorically related to the Federal Supplemental Security Income program (SSI), are ineligible for that program because of excess income and resources, and who have transferred or will transfer assets for the purpose of qualifying for medical assistance as "medically needy" persons under New York's Medicaid program.

Recipients of SSI are eligible to receive medical assistance under New York's Medicaid program by virtue of the sole fact that as SSI recipients they are deemed "categorically needy" persons. Their medical assistance eligibility is Federally determined pursuant to an Agreement entered into in 1973 between the Secretary of Health, Education and Welfare (now the Secretary of Health and Human Services) and the New York State Department of Social Services (Agreement annexed as Appendix "D"). HEW requires that as a condition for determining medical assistance eligibility for SSI applicants and recipients it will apply SSI eligibility standards (20 CFR §416.2111). As found by the courts below, the Secretary countenances the transfer of assets prior to application for SSI benefits and such transfer has no effect on SSI eligibility.

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*The District Court noted:

> "Plaintiffs Ethel Caldwell, Anita Perito and Julia Whitlock have died since the commencement of their actions. The claims of Ethel Caldwell and Julia Whitlock have, by admission of their attorneys, become moot. The estate of Anita Perito has not been substituted as a party. However, her husband, James Perito remains a party in the action." (A-3).

Eligibility for the "medically needy" under the Medicaid program is determined by local departments of social services by applying State law and regulations of the State Department of Social Services. Under New York Social Services Law, §366.1(e) and regulation 18 NYCRR 360.8, a person cannot qualify for medical assistance who has made a voluntary transfer of assets for the purpose of qualifying for medical assistance, increasing his need therefor or defeating a future right of recovery.

The New York statute dealing with the prohibition against voluntary transfer of assets for the purpose of qualifying for medical assistance, although amended from time to time, has been on the statute books since the inception of the State Medicaid program in 1966. Until 1974, the Secretary approved the prohibition against transfers as part of New York's State plan under the medical assistance program (42 USC §1396, et seq.).* In 1978, well after the inception of the SSI program in 1972, HEW notified New York that its transfer-of-property prohibition with respect to aged, blind and disabled persons was not in compliance with the comparability standard of the Social Security Act (42 USC §1396a [a] [10] [C] [i]) in that the State could not impose an eligibility requirement on the "medically needy" not imposed by the Secretary in determining the eligibility of the "categorically needy" under the State's Agreement for Federal determinations of eligibility (A-20).

These consolidated actions** were thereafter commenced. The plaintiffs have claimed, and the courts below have agreed, that

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*After 1974 HEW started using pre-printed State medical assistance plans, and State regulations were no longer submitted for approval as part of the State plan.

**These actions were consolidated in the United States District Court for the Northern District of New York. *Perito v Blum* was commenced in the Southern District of New York and transferred for consolidation with *Caldwell v Blum*. The other three actions were commenced in the Northern District of New York (A-3).

New York's prohibition against the voluntary transfer of property for the purpose of qualifying for medical assistance conflicts with the Social Security Act (42 USC §1396a [a][10][C][i]) and Federal regulation (42 CFR §435.401) because it results in a more restrictive eligibility requirement for the "medically needy" who are categorically related to SSI than for "categorically needy" SSI recipients.

Decision and Order of the District Court

The District Court determined that jurisdiction is present under 28 USC §1343(3) based upon plaintiffs' claims of denial of due process and equal protection of the laws.

It certified "a class consisting of all aged, blind or disabled persons who had been denied or will in the future be denied medical assistance benefits for the 'medically needy' in New York State on the basis of a transfer-of-assets in violation of Social Services Law, §366.1(e) and 18 NYCRR §360.8" (A-13).

In granting plaintiffs' motion for a preliminary injunction, the District Court concluded that there had been a sufficient showing of likelihood of success on the merits. Under 42 USC §1396a (a)(10)(C)(i), the State must make medical assistance available to all persons who, except for income and resources, would be eligible for SSI benefits "and who have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical and remedial care and services". HEW has interpreted this provision to mean that a State agency must not use requirements for determining eligibility for medical assistance for medically needy "• • • aged, blind and disabled individuals [that are] more restrictive than those used under SSI • • •" (42 CFR §435.401[c]). Since the District Court found that under the SSI program an applicant may transfer assets for the purpose of qualifying for benefits, it concluded that there was an "apparent conflict between the State transfer of assets restriction and federal requirements." The Court held, therefore, in that it also

found that plaintiffs would be irreparably harmed, that plaintiffs had met the requirements for the issuance of a preliminary injunction.

Opinion of the Court of Appeals

The Court of Appeals affirmed the granting of the preliminary injunction "substantially for the reasons stated by Judge Munson."

The Court found that although 42 USC §1396a (a) (10) (C) (i) "is not unambiguous, HEW has in its regulation [42 CFR §435.401(c)] adopted the view that it does require comparable eligibility requirements for the medically needy and the categorically needy." Since considerable deference must be given the "reasonable interpretation" of a statute by an agency entrusted with its administration and because prior court decisions have upheld other HEW interpretations of the comparability provision, the Court of Appeals saw no reason to differ with HEW's interpretation.

The Court did note, however, that there was "some force" to the State's argument that Congress, in enacting the predecessor to section 1396a (a) (10) (C) (i) in 1965 and amending it in 1973 to extend medical assistance eligibility to persons in SSI categories, did not intend to bar states from imposing more restrictive eligibility requirements on the medically needy than on the categorically needy. The Court concluded, however, that "[n]othing in the legislative history of §1396a (a) precludes or is inconsistent with HEW's interpretation." Moreover, the Court noted "that Congress has recently considered several amendments to the Social Security Act which would authorize states to impose transfer-of-assets restrictions" and the "fact that a concerned committee of Congress considers that 'present law' bars transfer of assets has some tendency to confirm HEW's interpretation of Congress' intent in its earlier enactment of comparability provisions in 1965 and amendment of them in 1973."

Reasons for Granting the Writ

I

The decision below conflicts with the decision of the Court of Appeals for the Ninth Circuit in *Dawson v Myers.*

In the case of *Dawson v Myers, et al* (____F2d____ [9th Cir., Docket No. 79-3246, decided May 14, 1980]), the Court of Appeals for the Ninth Circuit considered, *inter alia*, whether California's transfer-of-assets prohibition conflicts with the provisions of 42 USC §1396a.* The issue before the Court was whether "the California transfer rule conflicts with 42 USC §1396a (a) (10) (C), which requires states providing benefits to the *medically needy* to cover 'all individuals who would, except for income and resources' be eligible for SSI (and therefore come under the *categorically needy* classification), 'and who have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical and remedial care and services' " (A-66).

The plaintiffs in *Dawson* contended that although " ' * * * the medically needy may have higher income and resource levels, the states must use the same rules for the medically needy as for the categorically needy' " (A-66). Since under the SSI program the "categorically needy" may dispose of excess assets to qualify for SSI and concomitantly medical assistance, plaintiffs asserted that California's transfer-of-assets prohibition "therefore cannot be applied to the *medically needy*" (A-67).

The Ninth Circuit rejected plaintiffs' contention and concluded that "California's transfer rule does not conflict with 42 USC §1396a (a) (10) (C)." Because it believed its interpretation of the Federal law to be correct, the Court refused to attach any weight to HEW's contrary interpretation, and concluded that regulation 42 CFR §435.401 does not apply to financial eligibility requirements (A-69).

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*The decision of the Ninth Circuit is appended as Appendix "E".

The decision of the Ninth Circuit directly conflicts with the holding of the Second Circuit in the case at bar. New York's transfer-of-assets prohibition, which is similar to that of California, has been held to violate the provisions of 42 USC §1396a(a)(10)(C)(i) because it imposes an eligibility requirement on the "medically needy" which is not imposed on the "categorically needy." Medical assistance eligibility for New York's "categorically needy" SSI applicants is determined by HEW based upon SSI standards, the same as for California's "categorically needy." However, the Second Circuit, contrary to the Ninth Circuit, has deferred to HEW's interpretation of 42 USC §1396a(a)(10)(c) that because SSI applicants may transfer property for the purpose of qualifying for SSI benefits, transfer-of-assets prohibitions may not be imposed against the "medically needy."

These conflicting decisions result in a substantial difference in the administration of the medical assistance programs in California and New York, and the latitude which each state has to define the scope of its program within the parameters established by Congress in Title XIX of the Social Security Act (42 USC §1396 *et seq.*).*

*The Fourth Circuit has also held that Maryland's transfer-of-assets prohibition conflicts with the Social Security Act in *Fabula v Buck* (598 F2d 869 [4th Cir. 1979]). The Massachusetts transfer-of-assets prohibition has been challenged in the United States District Court for the District of Massachusetts in *Robinson v Pratt* (Civil No. 79-1278-S). Moreover, Michigan has also been notified by HEW that its transfer-of-assets prohibition does not comply with the Social Security Act (A-34).

II

The decision below raises significant and recurrent issues in a program of cooperative Federalism concerning the state's ability to establish complementary eligibility standards for the medical assistance program.

A

Congress apparently intended in 42 USC §1396a (a) (10), with respect to State limitations on income and resources for purposes of eligibility for medical assistance, to assure comparability among the various categorical groups of needy people. The standards of eligibility for the aged, blind and disabled must be comparable "to the standards used to determine the eligibility of those who are to receive medical assistance as needy children" (S Rep No. 404, 89th Cong, 1st Sess, 77-78 [1965]; see also H Rep No. 213, 89th Cong, 1st Sess, 67 [1965]) (A-36, 37).

HEW has interpreted the comparability provision of 42 USC §1396a (a) (10) to require that a State may not impose more restrictive eligibility requirements for the "medically needy" than it does for the "categorically needy" within the same categorical group (42 CFR §435.401). Under the HEW interpretation, programmatic symmetry is satisfied by requiring that aged, blind and disabled applicants for medical assistance be allowed to transfer property voluntarily for the purpose of qualifying for medical assistance just because SSI recipients in the same category may do so for the purpose of qualifying for SSI benefits.*

*HEW does not disapprove of transfer-of-assets prohibitions in themselves. New York's transfer-of-assets prohibition was approved by the Secretary of Health, Education and Welfare as part of New York's State plan under the medical assistance program (42 USC § 1396, *et seq.*), prior to implementation of the SSI program in 1974. Upon withdrawing from its agreement with HEW for Federal determinations of medical assistance eligibility for persons eligible for SSI and making its own eligibility determinations for

Footnote continued on next page—

However, there is no logical correlation between the transfer of property for the purpose of qualifying for SSI and the transfer of property for the purpose of qualifying for medical assistance. It is most unlikely that an applicant for SSI would transfer vast assets to qualify for a Federal monthly income benefit of $208.80 (the monthly benefit including New York State supplementation is $271.41).* Comparable considerations do not apply to applicants for medical assistance since those benefits are unlimited. For example, a person who is entering a nursing home to spend the remainder of his or her life, where the cost of care is approximately $20,000 per year, has a tremendous incentive to transfer considerable assets to the family rather than use them to pay the cost of medical care. Thus, HEW's interpretation of the comparability provision contained in 42 USC §1396a(a)(10) is not only inconsistent with its legislative history, but it is also irrational.

—*Footnote continued from preceding page*

such persons, New York will again, in HEW's view, have the right to apply medical assistance eligibility standards more restrictive than the SSI eligibility standards, including the prohibition against voluntarily transferring property to qualify for medical assistance (42 USC § 1396a[f]; 42 CFR § 435.1[d]; cf *Drogolewicz v Quern*, 74 Ill App 3d 862 [1979]; *Lerner v Division of Family Services*, 70 Wis 2d 670 [1975]. On April 30, 1980, New York notified the Secretary of Health, Education and Welfare that it would terminate its agreement in 120 days. It should be noted that termination of the agreement will not moot the petitioner's appeal. The State, and its local social services districts, are and will continue to be adversely affected by the decision of the Court below during any period for which HEW makes medical assistance eligibility determinations for New York and the District Court's injunction is in effect. Moreover, New York will incur considerable additional administrative cost by withdrawing from the contract and if it should re-exercise its option to enter into an agreement for Federal eligibility determinations in the future, it would be unable to enforce its transfer-of-assets prohibition, unless the judgment of the Court below is reversed.

*The benefit levels at the times relevant to this proceeding.

B

New York's transfer-of-assets prohibition establishes a complementary eligibility standard consistent with the purposes of the Title XIX medical assistance program. This Court has held that State collateral eligibility standards in public assistance programs should not be voided by the Courts unless there is a clear manifestation of congressional intent that such requirements may not be imposed (*New York State Dept of Social Services v Dublino*, 413 US 405, 413 [1973]).

Title XIX contains no provision which precludes State transfer-of-assets prohibitions.* The legislative history of the medical assistance program is also silent on transfer of assets and the Court below apparently did not find any clear manifestation of congressional intent that this State's transfer-of-assets prohibition could not be imposed because of Federal comparability requirements (A-37).**

New York's medical assistance program has contained a prohibition against the voluntary transfer-of-assets for the purpose of qualifying for assistance since its enactment in 1966 (ch 256 of the Laws of New York of 1966). It expresses the policy of the State that it will use its finite resources to provide medical assistance only for truly needy persons, and not for those persons who create their own need by giving their property away. It is

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*Significantly, the Title XIX program allows excess income and resources to be spent down on necessary care and services for the purpose of qualifying for medical assistance (42 USC § 1396a[a][17]).

**The Court of Appeals noted that Congress is considering several amendments to the Social Security Act which would authorize states to impose transfer-of-assets restrictions (A-38). However, that fact, or the fact that a Committee of Congress seems to agree with HEW's interpretation, does not establish a "clear manifestation of Congressional intent" with respect to the provisions of the Social Security Act passed by a prior Congress. The Ninth Circuit in *Dawson v Myers et al., supra*, chose to disregard the Committee's statement because it was "apparently relying upon the erroneous administrative interpretation" (A-70).

consistent with the objective of the Federal program enacted in 1965, to provide medical assistance to those persons with insufficient income and resources "to meet the costs of necessary medical services" (42 USC §1396) and the "broad discretion" conferred on the states to adopt reasonable standards "* * * for determining eligibility and the extent of medical assistance under the plan * * * consistent with the objectives of * * *" Title XIX (*Beal v Doe*, 432 US 438, 444 [1977]; 42 USC §1396a [a] [17]).

Under the circumstances of this case, the Court below should not have deferred to HEW's interpretation of 42 USC §1396a (a) (10) (C) (i) that the State's transfer-of-assets prohibition could not be imposed. Although HEW's interpretation is often afforded deference, it must, nevertheless, conform to the law and should not be followed if it is lacking in rationality or is unauthorized by the Social Security Act (*Red Lion Broadcasting Co v F.C.C.*, 395 US 367, 381 [1969]; *Shea v Vialpando*, 416 US 251, 262, n 11 [1974]; *New York State Dept of Social Services v Dublino, supra*). Since HEW's interpretation was both irrational and unauthorized by the Social Security Act, New York's transfer-of-assets prohibition should not have been held to be in conflict with the provisions of Federal law and regulations.

Accordingly, the decision of the Court below raises serious issues in a program of cooperative Federalism concerning the ability of this State to establish complementary eligibility standards, consistent with the objectives of Title XIX and not prohibited by Congress, in the face of contrary policies of HEW.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Dated: Albany, New York
June , 1980

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioner Blum

SHIRLEY ADELSON SIEGEL
Solicitor General

CLIFFORD A. ROYAEL
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Appendices

APPENDIX A — DECISION AND ORDER OF DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ETHEL CALDWELL, individually and on behalf of all other persons similarly situated,

Plaintiff,

and

ELLA MC CULLOUGH, JANET RICHMOND, AGNES GRANT and MURIEL ROTHSTEIN, as next friend of BELLE BARNETT, individually and on behalf of all other persons similarly situated,

Plaintiff-Intervenors,

vs.

BARBARA BLUM, as Commissioner of the New York State Department of Social Services, JAMES L. COVERT, as Commissioner of the Madison County Department of Social Services, MADISON COUNTY, NEW YORK, JOHN L. LASCARIS, as Commissioner of the Onondaga County Department of Social Services, ONONDAGA COUNTY, NEW YORK, JOSEPH P. MENALDINO, as Commissioner of the Warren County Department of Social Services, WARREN COUNTY, NEW YORK, ROBERT E. LAUNDREE, as Commissioner of the Essex County Department of Social Services, ESSEX COUNTY, NEW YORK, GABRIEL T. RUSSO, as Commissioner of the Monroe County Department of Social Services, MONROE COUNTY, NEW YORK,

Defendants.

78-CV-569

ANITA PERITO and JAMES PERITO, individually and on behalf of all others similarly situated,

Plaintiffs,

and

LOUIS FRIEDMAN,

Plaintiff-Intervenor,

vs.

APPENDIX A — Decision and Order of District Court of the Northern District of New York

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services, and BLANCHE BERNSTEIN, individually and as Commissioner of the New York City Department of Social Services,

Defendants.

79-CV-34

JENNIE LANDERS,

Plaintiff,

vs.

BARBARA BLUM, Individually and as Commissioner of the New York State Department of Social Services, and DAVID R. ADINOLFI, as Commissioner of the Cortland County Department of Social Services, CORTLAND COUNTY, NEW YORK,

Defendants.

79-CV-30

JULIA WHITLOCK,

Plaintiff,

vs.

BARBARA BLUM, as Commissioner of the New York State Department of Social Services, and ROBERT WAGNER, as Commissioner of the Tompkins County Department of Social Services, TOMPKINS COUNTY, NEW YORK,

Defendants,

79-CV-309

APPEARANCES:

MONROE COUNTY LEGAL ASSISTANCE CORP., GREATER UPSTATE LAW PROJECT, Attorneys for Plaintiffs, 80 West Main Street, Rochester, NY 14614, OF COUNSEL: RENE H. REIXACH, ESQ.

APPENDIX A — Decision and Order of District Court of the Northern District of New York

HON. ROBERT ABRAMS, ATTORNEY GENERAL OF THE STATE OF NEW YORK, DEPARTMENT OF LAW, Attorneys for Barbara Blum, 333 E. Washington Street, Syracuse, NY 13202, OF COUNSEL: ANNE S. MEADVIN, ESQ., ASSISTANT ATTORNEY GENERAL.

HOWARD G. MUNSON, D.J.

MEMORANDUM-DECISION AND ORDER

The above consolidated actions are before the Court on plaintiff's motion for class certification and a preliminary injunction and defendant Blum's motion to dismiss or alternatively for summary judgment.[1]

The plaintiffs and plaintiff-intervenors in these lawsuits are individuals who have been denied medical assistance benefits as a result of voluntary transfers of property made either prior to application or while receiving medical assistance as SSI

[1]Four actions have been consolidated. *Perito v. Blum*, No. 78-VC-34 (filed January 15, 1979) was commenced in the Southern District of New York and transferred by court order for consolidation with *Caldwell v. Blum*, 78-CV-569 (filed November 6, 1978), *Landers v. Blum*, 79-CV-30 (filed January 16, 1979) and *Whitlock v. Blum*, 79-CV-309 (filed May 10, 1979).

Four people have been allowed to intervene in *Caldwell* and one in *Perito*.

Plaintiffs Ethel Caldwell, Anita Perito and Julia Whitlock have died since the commencement of their actions. The claims of Ethel Caldwell and Julia Whitlock have, by admission of their attorneys, become moot. The estate of Anita Perito has not been substituted as a party. However, her husband, James Perito remains a party in the action.

Defendants, all commissioners of the state or county social services departments, are presently providing medical assistance benefits to the plaintiffs and plaintiff-intervenors pursuant to temporary restraining orders issued by the Court on stipulation of the parties.

Although defendant Blanche Bernstein has joined with defendant Blum in her motion to dismiss or alternatively for summary judgment, the Court shall refer to it as defendant Blum's motion.

recipients. In this action for declaratory and injunctive relief, they challenge the validity of the New York State rule regarding the transfer of assets by individuals applying for or receiving medical assistance benefits as "medically needy" persons.

Plaintiffs claim that the transfer restriction is unconstitutional as a denial of equal protection and due process. They also allege that the rule is in conflict with the federal statutes and regulations dealing with eligibility for medical assistance benefits in violation of the Supremacy Clause.

I.

Medicaid is a cooperative federal-state program established by Title XIX of the Social Security Act of 1965, 42 U.S.C. §§1396-1396k, for the purpose of providing medical assistance to low income persons who are age 65 or over, blind, disabled or members of families with dependent children. While state participation in the program is not mandatory, a state, such as New York, having elected to participate, must submit a medical assistance plan, in compliance iwth federal requirements, for HEW approval. 42 U.S.C. §§1396, 1396a.

The state plan must provide benefits to the "categorically needy",[2] and at the state's option may also include beneftis for the "medically needy".[3] A state choosing to provide the optional

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[2]42 U.S.C. §1396a (10) (A). "Categorically needy" as defined at 42 C.F.R. §435.4, "means aged, blind or disabled individuals or families and children who are otherwise eligible for medicaid and who meet the financial eligibility requirements for AFDC, SSI, or an optional State supplement."

[3]"Medically needy" as defined at 42 C.F.R. §435.4, "means aged, blind or disabled individuals or families and children who are otherwise eligible for medicaid and whose income and resources are above the limits prescribed for the categorically needy but are within limits set under the medicaid State plan."

benefits must comply with all of the federal requirements pertaining to the "medically needy". 42 U.S.C. §1396a(a)(10)(C) *Aitchison v. Berger*, 404 F. Supp. 1137, 1141 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 307 (2d Cir. 1976), *cert. denied*, 429 U.S. 890, 95 S.Ct. 246, 50 L. Ed. 2d 172 (1976).

New York State has opted to include in its plan provision for the payment of benefits to "medically needy" individuals who satisfy eligibility requirements established by the state with regard to income and resources. Social Services Law §366.2.

Under New York law, an applicant is allowed resources of $500 per person for a burial allowance, [Social Services Law §366.2(a) (3)] and a savings in an amount equal to one-half of the annual income exemption allowance set forth at Social Services Law §366.2(a) (8) (i).[4] Certain assets, including a homestead, are exempt from consideration as resources. Social Services Law §366.2.

New York law also requires that an applicant not have made a voluntary transfer of assets for the purpose of qualifying for or maintaining eligibility for the benefits or in order to defeat any future right to recovery of medical assistance paid. Any transfer made within eighteen months of application is presumed to have been made for one of the proscribed reasons. Social Security Law §366.1(e).[5]

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[4]The annual income exemption for one person at the time these plaintiffs applied for benefits was $3,100, resulting in a resource exemption, including burial reserve, of $2,050. The income exemption for one has recently been raised to $3,300, raising the resources exemption to $2,150.

[5]Social Services Law §366.1 (e) provides that medical assistance benefits shall be provided only if the applicant

> (e) has not made a voluntary transfer of property (i) for the purpose of qualifying for such assistance, or (ii) for the purpose of defeating

Footnote continued on next page—

It is this provision, along with its corresponding regulation and the administrative directives implementing the statute, which is being challenged by plaintiffs and plaintiff-intervenors in these actions.[6]

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> any current or future right to recovery of medical assistance paid, or for the purpose of qualifying for, continuing eligibility for or increasing need for medical assistance. A transfer of property made within eighteen months prior to the date of application shall be presumed to have been made for the purpose specified in subparagraph (i); a transfer of property that would be exempt from consideration under this title, made within eighteen months prior to the date of application without fair and reasonable consideration or made, without prior approval of the social services official, at any time after the application or determination of eligibility, shall be deemed to have been made for one or more of the purposes specified in subparagraph (ii) hereof. The social services official shall approve such an assignment or transfer if he determines based on the transfer agreement that the applicant or recipient will receive fair and reasonable consideration for such transfer. Such consideration shall be applied as a resource available to meet the person's medical needs as it becomes available unless all or a part of it subsequently qualifies as exempt property under subdivision two of this section.

[6] 18 N.Y.C.R.R. §3608 provides as follows:

> 360.8 Transfer of property. (a) In determining eligibility for medical assistance, if a transfer or assignment of real or personal property has been made within 18 months prior to the date of application or at any time after a determination of eligibility without the prior approval of the social services official, such transfer or assignment shall be presumed to have been made for the purpose of qualifying for such assistance, or for the purpose of defeating any current or future right to recovery of medical assistance paid.
>
> (b) If such transfer or assignment was made within 18 months prior to the date of application or at any time after a determination of eligibility without the prior approval of the social services official for

Footnote continued on next page—

II.

All of the plaintiffs and plaintiff-intervenors with the exception of Jennie Landers are over the age of 65 and would be eligible for SSI benefits but for their income and resources. Jennie Landers is a disabled person who but for her income and resources would be eligible for medical assistance benefits. The plaintiffs and plaintiff-intervenors are all in poor health and in need of the type of care and attention generally provided in a skilled nursing home facility. None have the resources necessary to pay for such care.

Plaintiffs James Perito and Jennie Landers and plaintiff-intervenors Janet Richmond and Agnes Grant each voluntary transferred his or her home to a family member within eighteen months prior to applying for medical assistance benefits. Each was denied benefits as a result of the transfer.

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> medical assistance, the applicant shall prove to the satisfaction of the social services official that such transfer or assignment was a normal transaction not done for the purpose of qualifying for medical assistance.
>
> (c) If the transfer or assignment is found to have been made for the purpose of qualifying for medical assistance, or for the purpose of defeating any current or future right to recovery of medical assistance paid, such assistance shall be denied.
>
> (d) The social services official shall approve such assignment or transfer if he determines, based on the transfer agreement, that the applicant or recipient will receive fair and reasonable consideration for such transfer. Such consideration shall be applied as a resource available to meet the person's medical needs as it becomes available, unless all or part of it subsequently qualifies as exempt property under section 366.2 of the Social Services Law.

The Administrative Directives merely provide instruction for the implementation of the statute and regulation.

Plaintiff-intervenors Louis Friedman and Belle Barnett were denied medical assistance benefits as a result of transfers of money made within eighteen months of application for benefits. Mr. Friedman made voluntary transfers of money from his savings account to his son and grandson. Mrs. Barnett's husband transferred her interest in a joint savings account to himself.

Plaintiff-intervenor Ella McCullough has received medical assistance benefits since 1966 and SSI benefits from 1974 through late 1978. In January of 1978, while receiving SSI and medicaid, she voluntarily transferred her home to a family member. In September of 1978 she entered a skilled nursing home facility and became ineligible for SSI by virtue of her income. She subsequently received notice that her medical assistance benefits were being terminated as a result of the transfer.

Each of the plaintiffs and plaintiff-intervenors requested a fair hearing as a result of the denials, and in each instance, the hearing decision upheld the agency's denial of benefits.[7]

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[7]Although some plaintiffs transferred exempt real property while others transferred money, separate treatment on that issue is not necessary.

According to the Social Security Claims Manual §12507 (b), transfers of both real property and money are allowed prior to application for SSI benefits.

III.

Plaintiffs allege that the jurisdictional basis for this 42 U.S.C. §1983 civil rights action[8] is provided by 28 U.S.C. §§1331(a)[9] and 1343(3).[10]

The Second Circuit, applying the liberal standard set forth in *Hagans v. Lavine*, 415 U.S. 528, 534-43, 94 S. Ct. 1372, 39 L. Ed. 2d 577 (1974), has determined that in "welfare" type cases alleging violations of due process and equal protection, jurisdiction under 28 U.S.C. §1343(3) will lie so long as the constitutional issues presented are neither frivolous nor so insubstantial as to be beyond the jurisdiction of the court. *Greklek v. Toia*, 565 F.2d 1259 (2d Cir. 1977) *cert. denied sub.*

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[8]42 U.S.C. §1983 provides that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[9]28 U.S.C. §1331 (a) provides in pertinent part that

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States. . .

[10]28 U.S.C. §1343 (3) provides that "the district court shall have original jurisdiction of any civil action authorized to be commenced by any person

> (3) To redress the deprivation, under color of any State law, statute, ordinance, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

nom. Blum v. Toomey, 436 U.S. 962 (1978). *Andrews v. Maher*, 525 F.2d 113 (2d Cir. 1975).

Concluding in this case that the plaintiffs' claim of denial of due process and equal protection is neither frivolous nor insubstantial, the Court finds that jurisdiction is present under 28 U.S.C. §1343(3) and need not examine 28 U.S.C. §1331(a) as a jurisdictional basis for these actions.[11]

Having found jurisdiction present with regard to the constitutional claims, this Court is empowered to decide plaintiffs' pendent claim as well.[12] *Hagans v. Lavine, supra.*

IV.

Plaintiffs seek to represent a class composed of all persons who have been, are presently, or who may in the future be eligible for medical assistance benefits for the "medically needy" in New

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[11]Under *Hagans v. Lavine, supra*, at p. 539:

> A claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.' *Ex parte Poresky*, 290 U.S. 30, 32 (1933)

Although transfer of assets restrictions have been challenged in other lawsuits, [Cf. *Fabula v. Buck*, 598 F.2d 869 (4th Cir. 1979); *Buckner v. Maher*, 424 F. Supp. 366 (D. Conn. 1976), *aff'd*, 434 U.S. 898 (1977); *Dawson v. Beach*, No. C 78-2350MML (Sx) (C.D. Cal., May 10, 1979)] the issue has not been clearly resolved.

[12]In their pendent claim, plaintiffs and plaintiff-intervenors allege violations by defendants of 42 U.S.C. §§1396a (a) (10) (C) (i), 1396a (a) (17) and 1396a (a) (18), and former regulations 42 C.F.R. 448.2 (b) (1), 448.2 (b) (2), 448.3 (c) (3) (ii) and 448.3 (c) (4), recodified effective October 1, 1978 at 42 C.F.R. Part 435.

York State, including those who have in the past been denied eligibility as a result of a voluntary transfer of assets.[13]

In order for class certification to be granted, the prerequisites set forth at Rule 23(a) of the Fed. R. Civ. Pro. must be satisfied. First, the class must be so numerous that joinder of all members would be impracticable. Counsel for the plaintiff has submitted statistical data obtained from defendants indicating that in June of 1978 there were over 150,000 persons in New York State receiving medical assistance only.[14] It can be reasonably assumed that the number of applicants was substantially greater. Therefore, the numerosity requirement has clearly been met.

The second requirement, that there be questions of law or fact common to the class, has likewise been satisfied. The common legal question is whether Social Services Law §366.1(e), 18 N.Y.C.R.R. 360.8 and New York State Department of Social Services Administrative Directives 77ADM-73 and 78ADM-89 are in violation of federal requirements.

Although each class member would, no doubt, present a slightly varying factual situation, the claim made by plaintiffs of

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[13]*Caldwell v. Blum* and *Perito v. Blum* were commenced as class actions. *Landers v. Blum*, a tag-along action now consolidated with *Caldwell* and *Perito* was not brought as a class action, and plaintiff Jennie Landers has expressed no interest in being a class representative.

This motion for class certification was brought by plaintiff's counsel in *Caldwell*. Although Ethel Caldwell is now deceased and her claim moot, there are four plaintiff-intervenors in *Caldwell* as well as the plaintiff and plaintiff-intervenor in *Perito* who serve as potential class representatives at this time.

[14]This figure includes only those individuals who were receiving medical benefits alone, not those receiving medical benefits in conjunction with cash public assistance benefits.

improper denial of medical assistance benefits on the basis of an impermissible state imposed eligibility requirement, is identical to that of class members. Thus, the third requirement of Rule 23(a) has been met.

There is no indication that there are antagonistic interests between the proposed class representatives and class members. In addition, plaintiffs' counsel has had considerable experience in conducting class action litigation. Therefore, the Court is convinced that the final requirement of Rule 23(a), that the representative parties will be able to fairly and adequately represent the interests of the class, has been satisfied.

Since plaintiffs assert that certification is appropriate under Rule 24(b)(2), Fed. R. Civ. Pro., they must also demonstrate that "the party opposing the class has acted or refused to act on grounds generally applicable to the class thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

In this regard, defendant Blum, while not denying that the requirement has been satisfied, argues that class certification is unnecessary because even without class certification, judgment in favor of the plaintiffs would run to the benefit of all persons similarly situated.[15]

However, in these cases, the Court cannot ignore the fact that because of the advanced ages and infirm health of the plaintiffs and plaintiff-intervenors, class certification is necessary in order

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[15]The Section Circuit has indicated that in class actions involving state administrative official defendants, where injunctive relief is sought, class certification may not be necessary. *Galvan v. Levine*, 490 F.2d 1255 (2d Cir. 1973), *cert. denied* 417 U.S. 936, 94 S. Ct. 2652, 41 L.Ed.2d 240 (1974). However, the class action is still widely allowed in "welfare" type cases. Cf. *Greklek V. Toia, supra; Aitchison v. Berger, supra; Becker v. Toia*, 439 F. Supp. 324 (S.D.N.Y. 1977).

to avoid the substantial possibility of mootness.[16] See *Greklek v. Toia, supra; Mendoza v. Lavine*, 72 F.R.D. 520 (S.D.N.Y. 1976).

Therefore, the Court finds that class certification is appropriate and certifies a class consisting of all aged, blind or disabled persons who have been denied or will in the future be denied medical assistance benefits for the "medically needy" in New York State on the basis of a transfer of assets in violation of Social Services Law §366.i(e) and 18 N.Y.C.R.R. §360.8.

V.

Defendant Blum has moved for dismissal of the complaints in these consolidated actions under the doctrine of abstention. [17] In determining whether abstention is appropriate, the Court must keep in mind that "abstention from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River Water Cons. Dist. v. U.S.*, 424 U.S. 800, 813, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1975).

Application of the doctrine has traditionally been limited to the following three types of cases. See *Colorado River Water Cons. Dist. v. U.S., supra*, at pp. 814-17.

> (1) Cases raising a federal constitutional issue which depending upon a state court interpretation of pertinent state law might be mooted or presented in a different posture. Cf. *Stone v. Philbrook*, 528 F.2d 1084 (2d Cir. 1975); *Goldberg v. Carey*, 601 F.2d 653 (2d Cir. 1979).

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[16] As previously pointed out, three named plaintiffs have died since the commencement of their actions.

[17] Historically, under the principles of comity and federalism, state courts have been offered a measure of protection from interference by federal courts through the doctrine of abstention. Cf. *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed.2d 669 (1971); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S. Ct. 1200, 43 L. Ed.2 482 (1975).

(2) Cases presenting difficult questions of state law relating to policy problems which are of substantial import and whose importance transcends the case at bar. Cf. *Louisiana Power & Light Co. v. City of Thibadaux*, 360 U.S. 25, 79 S. Ct. 1070, 3 L. Ed. 2d 1058 (1959).

(3) Cases which fall within the rule articulated in *Younger v. Harris, supra*, and *Huffman v. Pursue, Ltd., supra*, because of the existence of a pending state court action involving the same issue.[18]

Defendant Blum relies primarily on the *Younger-Huffman* principle as the basis for abstention and argues that the Court should abstain from exercising jurisdiction in these actions because of the existence of an action pending in state court at the time the present actions were commenced.

Rinefierd v. Blum, supra, an action involving an attack on the New York State transfer of property restriction, was brought in state court by way of an Article 78 proceeding challenging a fair hearing decision. The hearing decision affirmed a denial of medical assistance benefits to Mr. Rinefierd as a result of a

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[18]In *Younger v. Harris, supra*, federal jurisdiction was refused when invoked for the purpose of restraining criminal proceedings pending in a state court against the party initiating the federal action. The Court, in *Huffman v. Pursue, Ltd., supra*, extended the policy to actions which, while not strictly criminal, are more akin to criminal proceedings than most civil actions because of the involvement of a state interest as great as that in criminal cases.

The Court in *Huffman* explained that the abstention policy was necessary

> . . . since interference with a state judicial proceeding prevents the state not only from effectuating its substantive policies, but also from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies. Such interference also results in duplicative legal proceedings, and can readily be interpreted 'as reflecting negatively upon the state court's ability to enforce constitutional principles.' Cf. *Steffel v. Thompson*, 415 U.S. 402 (1974). (p. 604)

voluntary transfer of property within eighteen months of application.

Rinefierd was decided by the Appellate Division, Fourth Department in January of 1979. The Court, affirming a State Supreme Court ruling, found that Social Services Law §366.1(e) did not violate federal requirements.[19] The petitioner did not seek leave to appeal to the Court of Appeals, and the time to do so has now expired.

The Court does not agree with defendant Blum's contention that the existence of Rinefierd requires abstention under *Younger-Huffman.* First of all, *Rinefierd* is no longer pending in state court. Secondly, unlike in *Younger* and *Huffman,* none of the plaintiffs or plaintiff-intervenors in these actions was a party in the state court action.[20] Mr. Rinefierd, the petitioner in the state court action, is, according to plaintiffs' counsel, now deceased and therefore not even a potential class member in this lawsuit.

The Supreme Court in *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 930, 95 S. Ct. 2561, 45 L. Ed.2d 648 (1975), determined that although a federal court should in almost all cases refuse to interfere with an ongoing state criminal proceeding, when no

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[19]The Court, in *Rinefierd,* did not address the issue of whether the transfer of assets restriction is in violation of 42 U.S.C. §1396a (a) (10) (C) (i) and its corresponding regulations.

[20]In each of the cases relied upon by defendant Blum in her argument for abstention under *Younger-Huffman,* the plaintiffs in the federal court action were parties to the pending state action. *Judice v. Vail,* 430 U.S. 327, 97 S. Ct. 1211, 51 L. Ed.2d 376 (1977); *Trainor v. Hernandez,* 431 U.S. 434, 97 S. Ct. 1911, 52 L. Ed.2d 486 (1977).

such proceeding is pending against the federal plaintiff, abstention under *Younger* is not appropriate.[21]

Nor does the Court find that these actions fall into either of the other categories in which abstention is proper.

In *Harman v. Forssenius*, 380 U.S. 528, 85 S. Ct. 1177, 14 L. Ed.2d 50 (1965), the Court, addressing the issue of abstention in situations in which the interpretation of a state statute is in question stated that

> [w]here resolution of the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law, abstention may be proper in order to avoid unnecessary friction. . . .The doctrine, however, contemplates that deference to state court adjudication only be made where the issue of state law is uncertain. (citations omitted) If the state statute in question, although never interpreted by a state tribunal, is not fairly subject to an interpretation which will render unnecessary, or substantially modify the federal constitutional question, it is the duty of the federal court to exercise its properly invoked jurisdiction. pp. 534-35.

The New York State intermediate appellate court deciding *Rinefierd* adopted the same interpretation of Social Services Law §366.1(e) as offered by the plaintiffs in these actions. This Court can suggest no other reasonable interpretation.[22] Fur-

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[21] While *Doran* involved a pending state criminal action, rather than civil as in this case, the Court can see no reason why the rule limiting the application of *Younger-Huffman* to situations in which the federal court plaintiff is a party to the state action would not be equally applicable to civil actions in which the federal plaintiff is not a party.

[22] In *Stone v. Philbrook, supra*, a case relied upon by defendant Blum, the Court was presented with a much different situation than the present since there was a serious question regarding the correct interpretation of a state statute.

thermore, it is most unlikely that the issue of the constitutionality of the statute will ever need to be determined since the Court is required to attempt to decide these actions on the basis of the pendent statutory claims before addressing the constitutional issues. See *Hagans v. Lavine, supra.*

Finally, these actions do not present the type of situation intended to fall within the category of cases in which abstention is proper because the action presents difficult questions of state law which relate to policy problems of substantial public import transcending the result of the case at bar.[23]

Cases falling into this group as a rule involve parochial state issues, (Cf. *Louisiana Power & Light Co. v. City of Thibadaux, supra,* involving the state's eminent domain policy; *Alabama Comm'n. v. Southern R. Co.,* 341 U.S. 341, 71 S. Ct. 762, 95 L. Ed.2d 1002 (1951), involving state regulation of intrastate trains) rather than issues of state law directly related to, and to a great extent controlled by, federal statutes and regulations.

While the Court does not doubt that the fiscal integrity of the State's public welfare system is of substantial public import, the fact that the medical assistance program is so interwoven with and to so great an extent controlled by federal law, precludes abstention on that basis.

Although this Court's refusal to abstain in this instance creates the potential for conflicting outcomes in the litigation of

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[23]Defendant Blum also suggests that abstention is appropriate because plaintiffs and plaintiff-intervenors have not exhausted their state administrative remedies. However, as previously indicated, each plaintiff and plaintiff-intervenor did have an administrative hearing prior to the commencement of their federal actions. In any event, when a plaintiff is asserting a constitutional claim, exhaustion of state remedies is not normally required. See *Monroe v. Pape,* 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed.2d 492 (1961); *Cordova v. Reed,* 521 F.2d 621 (2d Cir. 1975); *Almenares v. Wyman,* 453 F.2d 1075 (2d Cir. 1971).

similar issues, ". . . the mere potential for conflict in the results of adjudications, does not, without more, warrant staying exercise of federal jurisdiction." *Colorado River Water District v. U.S. supra*, at p. 816.

Having decided that abstention is not appropriate in these actions, the Court must deny defendant Blum's motion to dismiss.

VI.

As previously indicated, plaintiffs are asking this Court to grant a preliminary injunction, enjoining the defendants from enforcing Social Services Law §366.1(e), 18 N.Y.C.R.R. 360.8 and Administrative Directives of the New York State Department of Social Services 77ADM-73 and 78ADM-89.

A preliminary injunction may be issued only upon a showing of a likelihood of success on the merits and irreparable harm. *Sonesta Int'l. Hotels Corp. v. Wellington Associates*, 483 F.2d 247, 250 (2d Cir. 1973); *Triebwasser & Katz v. AT&T*, 535 F.2d 1356, 1359 (2d Cir. 1976). It is the opinion of this Court that plaintiffs have satisfied both requirements.

Plaintiffs contend that in addition to being unconstitutional, the New York transfer of assets restriction conflicts with federal statutes and regulations in violation of the Supremacy Clause. More specifically, plaintiffs claim that the rule violates federal requirements by creating more restrictive eligibility criteria for the "medically needy" than is allowed with regard to the "categorically needy", and by assuming the availability of resources not actually available to an applicant for medical assistance benefits.

In support of their position as to eligibility criteria, plaintiffs rely upon 42 U.S.C. §1396a(a)(10)(C)(i). This provision of the Social Security Act states that a state medical assistance plan which includes benefits for the "medically needy" must make

such assistance available to "all individuals who would, except for income and resources, be eligible. . . to have paid with respect to them supplemental security income benefits."[24]

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[24] 42 U.S.C. §1396a (a)(10) provides in pertinent part:

A State plan for medical assistance must—

(10) provide—

(A) for making medical assistance available to all individuals receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A or subchapter IV of this chapter, or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter;

(B) that the medical assistance made available to any individual described in clause (A)—

(i) shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual, and

(ii) shall not be less in amount, duration, or scope than the medical assistance made available to individuals not described in Clause A; and

(C) if medical assistance is included for any group of individuals who are not described in clause (A) and who do not meet the income and resources requirements of the appropriate State plan, or the supplemental security income program under subchapter XVI of this chapter, as the case may be, as determined in accordance with standards prescribed by the Secretary—

(i) for making medical assistance available to all individuals who would, except for income and resources, be eligible for aid or assistance under any such State plan or to have paid with respect to them supplemental security income benefits under subchapter XVI of this chapter, and who have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical and remedial care and services, and

(ii) that the medical assistance made available to all individuals not described in clause (A) shall be equal in amount, duration, and scope;

The corresponding regulation, at 42 C.F.R. §435.401(c) provides that "(t)he agency must not use requirements for determining eligibility for optional coverage groups that are. . .(2) For aged, blind, and disabled individuals, more restrictive than those used under SSI. . ."

Plaintiffs point out that under the Social Security Act and the regulations promulgated thereunder, an applicant for SSI benefits who has resources in excess of the eligibility limit is allowed to dispose of the assets in order to qualify, and must be paid conditional SSI and medical assistance benefits pending disposal. 42 U.S.C. §1382b, 42 C.F.R. §435.120(b).

The Social Security Claims Manual at §12507 provides that the transfer of assets prior to application for SSI benefits has no affect on eligibility, even if the assets would have brought the applicant's resources above the eligibility limit. A transfer made by a person receiving SSI benefits usually has no effect on eligibility as long as the recipient's countable resources met the eligibility requirements prior to the transfer. Social Security Claims Manual §12508.[25]

HEW officials from the New York Office, in letters written May 16, 1978 and August 4, 1978, have advised defendant Blum that the New York transfer of assets restriction is in violation of federal requirements in that it results in a more restrictive eligibility criteria for the "medically needy" than is allowed for the "categorically needy." More recently, in the HEW Com-

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[25]In her argument for summary judgment, defendant Blum points out that the Social Security Claims Manual is not a mandatory regulation but merely a statement of policy adopted by HEW, and therefore not binding on the State Department of Social Services. Nonetheless, policy explanations by HEW with regard to the Social Security Act are entitled to considerable deference and cannot be totally disregarded by this Court. *Friedman v. Berger*, 547 F.2d 724, 731 (2d Cir. 1976), *cert. denied*, 430 U.S. 948 (1977).

pliance Report for the quarter ending June 30, 1979, New York State was officially cited as being out of compliance with federal requirements on the same basis.

It is clear that a state may not adopt eligibility criteria which result in the denial of benefits to a class of individuals made eligible by federal standards. *Townsend v. Swank*, 404 U.S. 282, 291, 92 S. Ct. 502, 30 L. Ed.2d 448 (1971); *King v. Smith*, 392 U.S. 309, 88 S. Ct. 2128, 20 L. Ed.2d 1118 (1968); *Buckner v. Maher*, 424 F. Supp. 366 (D. Conn. 1976), *aff'd*, 434 U.S. 898 (1977).

The issue of the treatment of the "medically needy" as compared with the "categorically needy" has been raised in other lawsuits, with the courts generally accepting the principle that, unless specifically authorized by federal law, requirements for the former group may be no harsher than for the latter. Cf. *Greklek v. Toia, supra; Aitchison v. Berger, supra.*[26]

More recently, in *Fabula v. Buck, supra*, a case challenging a Maryland transfer of assets regulation similar to the New York restriction, the Court found that the restriction on the transfer of assets by the "medically needy" violated federal requirements since no such prohibition was permitted with regard to "categorically needy" recipients.[27]

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[26]Defendant Blum has suggested that where there is an inconsistency between federal regulations and a state statute results in the imposition of impermissible eligibility criteria, federal law must prevail. *Townsend v. Swank, supra.*

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[27]The Maryland regulation at COMAR §10.09.10 (D) provides as follows:

D. Transfer of Assets.

(1) An applicant who assigns or transfers assets, including those [which would be excluded in determining financial eligibility,] with the intent of becoming eligible for Medical Assistance or to circumvent the Program's recovery procedures during the 3 years before

Footnote continued on next page—

Defendant Blum, however, contends that the New York transfer of assets prohibition is not a substantive eligibility requirement but rather a valid administrative tool for dispensing public assistance. This Court disagrees.

Social Services Law §§366.1 & 1(e) clearly state that in order to be eligible for medical assistance benefits, an applicant may not

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—Footnote continued from preceding page

> filing application is ineligible if the transfer results in a loss of a resource which would have been available to meet medical expenses or in the loss of a potential source of recovery. . .
>
> (2) Assets transferred by a recipient, while receiving Medical Assistance, for the purpose of continuing to receive assistance or to circumvent recovery procedures, and without the consent of the local department of social services, are considered an existing asset affecting current and continued eligibility for a period not to exceed 3 years.
>
> (3) The unreported transfer of assets for the purpose of circumventing the provision of §D (1) and (2), above, will result in the recipient's ineligibility . . . COMAR 10.09.01.10 (D).

The major difference between the Maryland and New York rule is the time period prior to application for benefits during which transfers of property are presumed to have been made for a proscribed reason.

The Court of Appeals, enjoining the enforcement of the transfer of assets restriction in *Fabula*, reversed a determination by the District Court that the regulation was not an eligibility requirement but rather a provision designed to eliminate fraud.

The Court relied in part on an HEW amplification of its interpretation of 42 U.S.C. 1396a (a) (10) (C) (i), stating that it

> means that while a state might use more generous maintenance amounts in determining financial eligibility (i.e. medically needy levels . . . , disregards or asset exemptions) all other SSI eligibility criteria are to be used . . . (A)ll aged, blind and disabled persons . . . must have their eligibility determined using all SSI eligibility rules except for — and only except for — higher dollar amounts for income and resource eligibility levels. 42 Fed. REg. 2685 (1977).

have made a voluntary transfer of property for one of the proscribed reasons. Thus, the applicant has the burden of proving that a transfer of property was not made for eligibility purposes or to prevent future recovery for benefits paid. Failure to overcome the presumption that a transfer made within eighteen months of application was made for one of the proscribed reasons results in a denial of benefits. Because of the burden placed upon the applicant to prove entitlement to benefits it appears to the Court that it is a substantive eligibility requirement.[28] As an eligibility requirement, it cannot be upheld as an administrative took if, as in this case, it conflicts with federal requirements.[29]

Defendant Blum also argues that even if the transfer of assets restriction is an eligibility requirement, it does not conflict with federal requirements since pursuant to Social Security Law §366.1(e), the Department of Social Services has the authority to validate a transfer which would otherwise preclude eligibility. However, since federal law does not allow the imposition of a transfer restriction to begin with, the fact that the Department of Social Services has the option of deciding whether or not to apply the restriction in a particular case does not cure the defect.

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[28]In *Buckner v. Maher, supra,* the Court found a Connecticut statute which resulted in a denial of AFDC benefits to individuals who had made transfers of property within seven years of application for less than reasonable consideration or for the purpose of qualifying for benefits, to be a substantial eligibility requirement. See also *Lavine v. Milne,* 424 U.S. 577, 96 S. Ct. 1010, 47 L. Ed.2d 249 (1976).

[29]While state welfare procedures and rules have been upheld in the past if they served a valid administrative purpose. [Cf. *Wyman v. James,* 400 U.S. 309, 91 S. Ct. 381, 27 L. Ed.2d 408 (1971)] the fact remains that eligibility requirements which violate federal requirements may not stand even if done for administrative reasons. *Townsend v. Swank, supra.*

While the Court sympathizes with the State's interest in preserving the fiscal integrity of its welfare system, it recognizes that this cannot be done by a violation of federal requirements.

In light of the apparent conflict between the State transfer of assets restriction and federal requirements, the Court believes that the plaintiffs' and plaintiff-intervenors' likelihood of success in these actions is strong.[30]

The second requirement, as previously indicated, has also been satisfied. Each of the plaintiffs and plaintiff-intervenors in these actions is elderly, in poor health, and unable to afford the care and attention needed. Thus, the very survival of these individuals and those class members in similar situations is threatened by a denial of medical assistance benefits during the pendency of these actions.

In "welfare" type cases and in situations involving individuals with pressing medical needs, courts have generally recognized the probability of irreparable harm in the absence of injunctive relief. Cv. *Boddie v. Wyman*, 323 F. Supp. 1189 (N.D.N.Y. 1970), *aff'd*, 434 F.2d 1207 (2d Cir. 1970), *aff'd*, 402 U.S. 991 (1971); *Bass v. Richardson*, 338 F. Supp. 478 (S.D.N.Y. 1971). These actions are no exception.

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[30]Since the Court has found that plaintiffs are entitled to a preliminary injunction, based upon their claim with regard to eligibility criteria, pursuant to 42 U.S.C. §1396a (a) (10) (C) (i), it is not necessary at this time to examine plaintiffs claim with regard to 42 U.S.C. §1396a (a) (17).

[31]Having determined that plaintiffs' and plaintiff-intervenors' likelihood of success in these actions is strong enough to support a preliminary injunction, it is clear that the Court does not believe that defendant Blum is entitled to summary judgment. No further discussion is required with regard to that motion.

The Court finds, therefore, that having met the requirements, plaintiffs are entitled to a preliminary injunction and hereby enjoins the defendants from enforcing Social Services Law §366.1(3), 18 N.Y.C.R.R. 360.8 and New York State Department of Social Services Administrative Directives 77ADM-73 and 78 ADM-89 with regard to plaintiffs, plaintiff-intervenors and members of the class as defined by this Court during the pendency of these actions.

Defendant Blum's motion for summary judgment is denied.

It is so ordered.

Howard G. Munson
U.S. District Court

Dated: November 29, 1979
Syracuse, New York

APPENDIX B — OPINION OF COURT OF APPEALS, SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 718—September Term, 1979.
(Argued January 18, 1980 Decided April 16, 1980.)
Docket No. 79-7864

ETHEL CALDWELL, individually and on behalf of all other persons similarly situated,

Plaintiff-Appellee,

and

ELLA MC CULLOUGH, JANET RICHMOND, AGNES GRANT and MURIEL ROTHSTEIN, as next friend of BELLE BARNETT, individually and on behalf of all other persons similarly situated,

Plaintiff-Intervenors-Appellees,

against

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Defendant-Appellant,

and

JAMES L. COVERT, as Commissioner of the Madison County Department of Social Services, MADISON COUNTY, NEW YORK, JOHN L. LASCARIS, as Commissioner of the Onondaga County Department of Social Services, ONONDAGA COUNTY, NEW YORK, JOSEPH P. MENALDINO, as Commissioner of the Warren County Department of Social Services, WARREN COUNTY, NEW YORK, ROBERT E. LAUNDREE, as Commissioner of the Essex County Department of Social Services, ESSEX COUNTY, NEW YORK, GABRIEL T. RUSSO, as Commissioner of the Monroe County Department of Social Services, MONROE COUNTY, NEW YORK,

Defendants-Appellees.

ANITA PERITO and JAMES PERITO, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

and

LOUIS FRIEDMAN,

Plaintiff-Intervenor-Appellee,

against

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Defendant-Appellant,

and

BLANCHE BERNSTEIN, individually and as Commissioner of the New York City Department of Social Services,

Defendant-Appellee.

JENNIE LANDERS,

Plaintiff-Appellee,

and

JOSEPHINE MANICCIA,

Plaintiff-Intervenor-Appellee,

against

BARBARA BLUM, Individually and as Commissioner of the New York State Department of Social Services,

Defendant-Appellant,

and

DAVID R. ADINOLFI, as Commissioner of the Cortland County Department of Social Services, CORTLAND COUNTY, NEW YORK,

Defendant-Appellee.

APPENDIX B—Opinion of Court of Appeals, Second Circuit

JULIA WHITLOCK,

Plaintiff-Appellee,

against

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Defendant-Appellant,

and

ROBERT WAGNER, as Commissioner of the Tompkins County Department of Social Services, TOMPKINS COUNTY, NEW YORK,

Defendant-Appellee.

Before:

FRIENDLY, MANSFIELD and KEARSE,

Circuit Judges.

Appeal from a decision and order of the United States District Court for the Northern District of New York, Howard G. Munson, *Judge*, granting a preliminary injunction restraining enforcement of §366.1(e) of New York State Social Services Law, which denies Medicaid benefits to persons who have made property transfers for the purpose of receiving medical assistance benefits, on the ground that it is contrary to the Social Security Act, 42 U.S.C. §1396a(a)(10)(C)(i).

Affirmed.

CLIFFORD A. ROYAEL, Esq., Albany, NY (Robert Abrams, Attorney General of the State of New York, Jeremiah Jochnowitz, Assistant Solicitor General, Alan W. Rubenstein, Esq., Albany, NY, of counsel), *for Appellant State Commissioner of Social Services.*

RENE H. REIXACH, Esq., Greater Upstate Law Project, Rochester, NY, *for Plaintiffs-Appellees and Plaintiffs-Intervenors-Appellees.*

APPENDIX B—Opinion of Court of Appeals, Second Circuit

MANSFIELD, *Circuit Judge:*

The Commissioner of the New York State Department of Social Services appeals from a decision and order of the District Court for the Northern District of New York entered by Judge Howard G. Munson on December 3, 1979, which granted the application of plaintiffs (aged, blind or disabled New York residents who had been denied medical assistance benefits because of their transfers of their property to others) for class certification and a preliminary injunction restraining the enforcement of N.Y. Social Services Law §366.1(e),[1] and

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[1]New York Social Services Law §366.1(e) provides in pertinent part:

"§ 366. Eligibility

"1. Medical assistance shall be given under this title to a person who requires such assistance and who

• • •

"(e) has not made a voluntary transfer of property (i) for the purpose of qualifying for such assistance, or (ii) for the purpose of defeating any current or future right to recovery of medical assistance paid, or for the purpose of qualifying for, continuing eligibility for or increasing need for medical assistance. A transfer of property made within eighteen months prior to the date of application shall be presumed to have been made for the purpose specified in subparagraph (i); a transfer of property that would be exempt from consideration under this title, made within eighteen months prior to the date of application without fair and reasonable consideration or made, without prior approval of the social services official, at any time after the application or determination of eligibility, shall be deemed to have been made for one or more of the purposes specified in subparagraph (ii) hereof. The social services official shall approve such an assignment or transfer if he determines based on the transfer agreement that the applicant or recipient will receive fair and reasonable consideration for such transfer. Such consideration shall be applied as a resource available to meet the person's medical needs as it becomes available unless all or a part of it subsequently qualifies as exempt property under subdivision two of this section."

Regulation 18 N.Y.C.R.R. 360.8,[2] and denied the Commissioner's motion to dismiss the action. The statute and regulation deny Medicaid benefits to persons who have made property transfers for the purpose of receiving medical assistance benefits.

Federal jurisdiction was invoked on the ground that the state statute and regulation denied plaintiffs due process and equal protection of the laws. Injunctive relief was granted on the ground that the New York transfer-of-assets restriction violates

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[2]Regulation 18 N.Y.C.R.R. 360.8 provides:

"360.8 Transfer of property.

(a) In determining eligibility for medical assistance, if a transfer or assignment of real or personal property has been made within 18 months prior to the date of application or at any time after a determination of eligibility without the prior approval of the social services official, such transfer or assignment shall be presumed to have been made for the purpose of qualifying for such assistance, or for the purpose of defeating any current or future right to recovery of medical assistance paid.

"(b) If such transfer or assignment was made within 18 months prior to the date of application or at any time after a determination of eligibility without the prior approval of the social services official for medical assistance, the applicant shall prove to the satisfaction of the social services official that such transfer or assignment was a normal transaction not done for the purpose of qualifying for medical assistance.

"(c) If the transfer or assignment is found to have been made for the purpose of qualifying for medical assistance, or for the purpose of defeating any current or future right to recovery of medical assistance paid, such assistance shall be denied.

"(d) The social services official shall approve such assignment or transfer if he determines, based on the transfer agreement, that the applicant or recipient will receive fair and reasonable consideration for such transfer. Such consideration shall be applied as a resource available to meet the person's medical needs as it becomes available, unless all or part of it subsequently qualifies as exempt property under section 366.2 of the Social Services Law."

the Social Security Act, 42 U.S.C. §1396a(a)(10)(C)(i).[3] We affirm the grant of preliminary relief, substantially for the reasons

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[3]Title 42 U.S.C. §1396a provides in pertinent part:

"§1396a. State plans for medical assistance — Contents

"(a) A State plan for medical assistance must—

• • •

(10) provide—

"(A) for making medical assistance available to all individuals receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter;

"(B) that the medical assistance made available to any individual described in clause (A)—

(i) shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual, and

(ii) shall not be less in amount, duration, or scope than the medical assistance made available to individuals not described in clause A; and

"(C) if medical assistance is included for any group of individuals who are not described in clause (A) and who do not meet the income and resources requirements of the appropriate State plan, or the supplemental security income program under subchapter XVI of this chapter, as the case may be, as determined in accordance with standards prescribed by the Secretary—

(i) for making medical assistance available to all individuals who would, except for income and resources, be eligible for aid or assistance under any such State plan or to have paid with respect to them supplemental security income benefits under subchapter XVI of this chapter, and who have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical and remedial care and services, and

(ii) that the medical assistance made available to all individuals not described in clause (A) shall be equal in amount, duration, and scope;

• • •

stated by Judge Munson, and dismiss as interlocutory and nonappealable defendant's cross-appeal from the orders granting class action status and denying dismissal of the action.

Title XIX of the Social Security Act, 42 U.S.C. §§1396-96k, authorizes each state to participate in a cooperative federal-state program for medical assistance to the needy, known as Medicaid, and to operate a medical assistance plan, subject to federal statutory and regulatory guidelines. If a state chooses to participate, it must adopt a statutory plan setting forth the coverage to be extended to recipients, including the terms upon which individuals will be eligible and it must extend benefits to those who are eligible for federally-funded financial assistance, such as recipients of Supplementary Security Income (SSI) for the aged, blind and disabled, known as the "categorically needy." In addition, a participating state may elect to provide for payment for medical services to those aged, blind or disabled individuals, known as the "medically needy," whose incomes or resources, while exceeding the financial eligibility requirements for the categorically needy (such as an SSI recipient) are insufficient to pay for necessary medical care.

New York elected to participate in the Medicaid program and to pay benefits to the "medically needy" upon their meeting eligibility requirements specified in N.Y. Social Services Law, §366. The issue now before us is whether New York's statutory eligibility requirements for the medically needy are compatible with applicable federal law.

It is undisputed that New York imposes more restrictive eligibility requirements on the medically needy than on the categorically needy. Under the Social Security Act and regulations thereunder, a "categorically needy" applicant for SSI benefits, whose assets exceed the program's eligibility limits, may by disposing of his excess assets become eligible for

Medicaid benefits, 42 U.S.C. §1382b(b),[4] 42 C.F.R. §435.120(b),[5] Social Security Manual at §12507. However, under the N.Y. Social Services Law, §366(1)(e) and regulations thereunder, 18 N.Y.C.R.R. 360.8, a voluntary transfer of assets in order to qualify for or maintain eligibility for medicaid benefits (or to defeat recovery of medical assistance already paid, see N.Y. Social Services Law, §369(1)(b)) renders a medically needy person ineligible for Medicaid benefits.[6]

The issue here turns on whether, as plaintiffs contend, the language of the Social Security Act, 42 U.S.C. §1396a prohibits the State from thus imposing more restrictive eligibility

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[4]Title 42 U.S.C. §1382(b) provides:

> "(b) The Secretary shall prescribe the period or periods of time within which, and the manner in which, various kinds of property must be disposed of in order not to be included in determining an individual's eligibility for benefits. Any portion of the individual's benefits paid for any such period shall be conditioned upon such disposal; and any benefits so paid shall (at the time of the disposal) be considered overpayments to the extent they would not have been paid had the disposal occurred at the beginning of the period for which such benefits were paid."

[5]Title 42 C.F.R. §435.120(b) provides in pertinent part:

> "§435.120 *Individuals receiving SSI.*
>
> "Except as allowed under §435.121, the agency must provide medicaid to aged, blind, and disabled individuals or couples who receive SSI, including—
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> • • •
>
> "(b) Individuals receiving SSI under an agreement with the Social Security Administration to dispose of resources that exceed the SSI dollar limits on resources.

[6]As §366(1)(e) and 18 N.Y.C.R.R. 360.8 state, any transfer of property for less than full consideration made within 18 months prior to the filing of an application for assistance will be presumed to have been made for one of the proscribed reasons.

requirements upon the medically needy than upon the categorically needy. Plaintiffs rely principally on §1396a(a)(10)(C)(i), which obligates states that have chosen to include the medically needy in their Medicaid Plans to use "comparable standards" in determining Medicaid eligibility. It directs a state to make Medicaid benefits available to

> "all individuals who would, except for income and resources, be eligible . . . to have paid with respect to them supplemental security income benefits . . ., and who have insufficient *(as determined in accordance with comparable standards)* income and resources to meet the costs of necessary medical and remedial care and services." (Emphasis added).

Although the foregoing quoted provision is not unambiguous, HEW has in its regulations adopted the view that it does require comparable eligibility requirements for the medically needy and the categorically needy. Title 42 C.F.R. §435.401(c), provides that a state medicaid agency

> "must not use requirements for determining eligibility for optional coverage groups [such as the medically needy] that are . . . (2) For aged, blind and disabled individuals, more restrictive than those used under SSI. . . ."

Indeed, HEW has written to the states of New York, California and Michigan, which have transfer-of-assets prohibitions with respect to medicaid eligibility for the medically needy but not for the categorically needy, advising them that their policy is not in compliance with the Social Security Act.

Moreover, the courts have repeatedly recognized §1396a(a)(10)(C)(i) as obligating states to adopt no more restrictive standards for medicaid eligibility than those governing the eligibility of other groups. In *Greklek v. Toia*, 565 F.2d 1259 (2d Cir. 1977), *cert. denied sub nom. Blum v. Toomey*, 436 U.S. 962 (1978), we invalidated a more restrictive state standard for deduction of work expenses for medically needy

than for categorically needy and in *Fabula v. Buck*, 598 F.2d 869 (4th Cir. 1979), the Fourth Circuit held that a Maryland transfer-of-assets prohibition similar to that of New York, which applied to the medically needy, violates §1396a(a)(10)(C)(i). But see contra, *Dawson v. Beach*, ____ F.Supp. ____ (C.D. Cal., May 10, 1979, Civ. 78-2350-MML). Since the argument of this appeal the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, has held §366.1(e) of N.Y. Social Services Law to be violative of the Supremacy Clause by reason of its conflict with the foregoing provisions of the Social Security Act and regulations thereunder, *Scarpuzza v. Blum*, ____ A.D.2d ____ (2d Dept. March 17, 1980).

Plaintiffs' position is further buttressed by §1396a(a)(17) which requires a state plan for assistance to

> "(17) include reasonable standards (which shall be comparable for all groups . . .) for determining eligibility for and the extent of medical assistance under the plan which . . . (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient and (in the case of an applicant who would, except for income and resources, be eligible [to receive . . . SSI benefits i.e. the categorically needy]) as would not be disregarded . . . in determining his eligibility for such aid, assistance or benefits."

In other words, as we noted in *Friedman v. Berger*, 547 F.2d 724, 728 (2d Cir. 1976), *cert. denied*, 430 U.S. 984 (1977), "for persons such as plaintiffs, who would be eligible to receive SSI benefits because of their age, blindness or disability were it not for their income, state standards must provide that income which is disregarded in determining SSI eligibility also be disregarded in determining eligibility for and the extent of medical assistance under Medicaid."

Thus plaintiffs have clearly shown a strong likelihood of success on the merits here. The State's principal defense, and one which has apparently not been raised in prior cases, is that Congress, in enacting the predecessor to §1396a(a)(10)(C)(i) in 1965, did not intend to bar states from imposing more restrictive eligibility requirements on the medically needy than on the categorically needy. Specifically, the State contends that Congress intended that the standards for medical assistance for the needy blind, aged, disabled and dependent children be comparable as between these classifications, not that the medically needy be treated comparably with the categorically needy. 42 C.F.R. §435.401(c), the State argues, is therefore inconsistent with the statute and thus invalid. In support of this contention the State relies on a statement in the Senate and House Report, which apparently relates to §1396a(a)(10), that the purpose of the comparability provision was to

> "make more specific a provision now in the law that in determining eligibility for and the extent of aid under the plan, States must use reasonable standards consistent with the objectives of the titles. Although States may set a limitation on income and resources which individuals may hold and be eligible for aid, they must do so by maintaining a comparability among the various categorical groups of needy people. Whatever level of financial eligibility the State determines to be that which is applicable for the eligibility of the needy aged, for example, shall be comparable to that which the State sets

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[7]The predecessor of §1396a(a)(10)(C)(i) required those states which chose to extend aid to the medically needy to provide:

> "(i) for making medical or remedial care and services available to all individuals who would, if needy, be eligible for aid or assistance under any such State plan and who have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical or remedial care and services, ..." Pub. L.No. 89-97 §1902(a)(10)(V)(i).

> to determine the eligibility for the needy blind and disabled; and must also have a comparability to the standards used to determine the eligibility of those who are to receive medical assistance as needy children and the parents or other relatives caring for them." S. Rep. No. 404, 89th Cong., 1st Sess. 77-78 (1965); see H. Rep. No. 213, 89th Cong., 1st Sess. 67 (1965).

In 1972 Congress adopted the Supplemental Security Income program (SSI) under which the separate state programs under which the aged, blind and disabled had received assistance were combined into a federally funded assistance program with nationwide uniform eligibility requirements. Pub. L. No. 92-603 (1972), 42 U.S.C. §§1381, *et seq.* Although Congress neglected to extend medical assistance to the new SSI recipients or medically needy persons in the SSI categories, it amended §1396a(a)(10) in 1973 to state expressly (as it now does) that states must provide medical assistance to SSI recipients. Pub. L. No. 93-233, §13 (1973). According to the State, that amendment of §1396a(a)(10)(C)(i) was merely technical and should not be read to require a state to treat the medically needy the same as the categorically needy, but only to treat the aged, blind and disabled medically needy comparably.

Although the State's argument is not without some force, we are not persuaded by the language of the House and Senate Reports that 42 C.F.R. §435.401(c) should be held invalid. Nothing in the legislative history of §1396a(a) precludes or is inconsistent with HEW's interpretation. That the aged, blind and disabled medically needy must be treated comparably as between each other does not mean that as a group (the medically needy) they should not be treated comparably with the categorically needy. HEW has promulgated a number of regulations on comparability in addition to 42 C.F.R. §435.401(c), and the thrust of those regulations, which have been invariably

upheld by the court[8] and which are based not only on §1396a(a)(10)(C)(i) but also on the explicit language of 1396a(a)(17), *supra*, is that "while a state might use more generous maintenance amounts in determining financial eligibility . . . all other SSI eligibility criteria are to be used." 42 Fed. Reg. 2685 (1977).

Considerable deference must be given to the reasonable interpretation of a statute by an agency entrusted with its administration, *New York Department of Social Service v. Dublino*, 413 U.S. 405, 421 (1973); *Friedman v. Berger, supra*, and we see no reason to differ with that interpretation of the pertinent provisions of the statute here, particularly in light of the fact that the courts have invariably upheld the validity of HEW's numerous comparability provisions. We further note that Congress has recently considered several amendments to the Social Security Act which would authorize states to impose transfer-of-assets restrictions.[9] The fact that a concerned

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[8]See, for example, *Greklek v. Toia, supra* (relying on 42 C.F.R. §448.3(c); *Aitchison v. Berger*, 404 F. Supp. 1137 (S.D.N.Y. 1975), *affd. without opinion*, 528 F.2d 307 (2d Cir.), *cert. denied*, 429 U.S. 890 (1976) (upholding 45 C.F.R. 248.3(c)); *Schaak v. Schmidt*, 344 F.Supp. 99 (E.D. Wisc. 1971) (upholding 45 C.F.R. 248.21); and *Dominquez v. Milliken*, CCH Medicare and Medicaid Guide ¶ 26,633 (W.D. Mich. 1973) (upholding 45 C.F.R. 248.21). Because HEW insists on continually redesignating its regulations, we note that the predecessor to the current regulations was first proposed as 45 C.F.R. Part 248 at 38 Fed. Reg. 32216 (Nov. 13, 1974), and updated at 39 Fed. Reg. 9512 (March 11, 1974). The regulations were then codified as 42 C.F.R. Part 448, 42 Fed. Reg. 52827 (Sept. 30, 1977) and were recodified in their present form as 42 C.F.R. Part 435 at 43 Fed. Reg. 45204 (Sept. 29, 1978). The predecessor to 42 C.F.R. 435.401 is thus 45 C.F.R. 248.2 (a), (b) and (c).

[9]S. Rept. No. 96-471, 96th Cong., 1st Sess. 48 (1979) (to accompany H.R. 934) §257 reads:

> "The bill permits States to deny medical assistance to any aged, blind, or disabled person (including individuals who are not

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committee of Congress considers that "present law" bars transfer of assets prohibitions has some tendency to confirm HEW's interpretation of Congress' intent in its earlier enactment of comparability provisions in 1965 and amendments of them in 1973. See *New York Department of Social Service v. Dublino, supra,* 413 U.S. at 416 n.19; *Banco Nacional de Cuba v. Farr,* 383 F.2d 166, 175 (2d Cir. 1967), *cert. denied,* 390 U.S. 956 (1968).

Accordingly, we do not find persuasive the State's contention that §366.1(e) is complementary to and is not contrary to federal law. Decisions principally relied upon by the Commissioner are clearly distinguishable from or not inconsistent with our holding here. In *New York Department of Social Services v. Dublino,* 413

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> 'categorically ineligible') who has given away assets in order to meet the medicaid eligibility requirements (or has 'sold' such assets for less than their fair market value).
>
> "Under present law. States may provide medical assistance eligibility to recipients of aid to families with dependent children (AFDC) and to recipients of supplemental security income (SSI). In the case of SSI recipients, States have the option of making all SSI recipients eligible for medicaid or of limiting eligibility to those who met the State standards under the former State programs of aid to the aged, blind and disabled as in effect in 1972. States may deny eligibility for AFDC to persons who give away assets in order to meet the resources limits of that program and States which had such restrictions in their former programs for the aged, blind, and disabled in 1972 may continue to apply them in determining medicaid eligibility (but only if they are among the States that have elected to continue using those 1972 standards). However, States which have elected to make all SSI recipients eligible for medicaid do not have this option. In such States an individual who is on the SSI rolls must be included in the medicaid program even if he became an SSI recipient only by giving away property (or by selling it for far less than its true value).

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U.S. 405 (1973), the Supreme Court, in considering an entirely different program under the Social Security Act (the Federal Work Incentive Program known as WIN), held that it was not intended to preempt state work programs or work rules but remanded the case to determine whether certain sections of New York's Work Rules did contravene specific provisions of the Social Security Act. In *Rush v. Smith*, 573 F.2d 110 (2d Cir. 1978), the plaintiffs simply failed to show any conflict between New York procedures and the Social Security Act or any intent by Congress to bar state procedures of the type in issue. The Commissioner's contention that plaintiffs here have failed to demonstrate a likelihood of success must therefore be rejected.

We likewise find no merit in appellant's argument that plaintiffs have failed to prove a sufficient threat of irreparable

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> "Where an individual with significant assets is faced with the prospect of substantial medical expenses — particularly in cases where a prolonged period of institutionalization may be needed — present law may provide a strong incentive for him to give those assets away to a friend or relative so as to qualify for medicaid immediately. To the extent that this happens, the costs of the program are increased since medical expenses which could be met from the individual's assets are instead being paid for by public funds.
>
> "The bill would allow States the option of denying or limiting eligibility in this type of situation. If a State chooses to make use of this provision, an aged, blind, or disabled person would be considered (for purposes of medicaid eligibility) to still possess a disposed of asset for a period of 12 months if he gave it away in order to become eligible for medicaid. (In the case of an individual who sells an asset far less than its value, he will be considered for 12 months to have an asset worth the difference between the sale price and the fair market value.)

Footnote continued on next page—

harm to entitle them to relief against enforcement of the New York transfer-of-assets prohibition. Those medically needy applicants who have already transferred their assets and are being denied Medicaid benefits can hardly be expected to recover those assets for use in payment of medical bills; in the meantime they would, absent relief, be exposed to the hardship of being denied essential medical benefits. The state has made no showing of hardship to it other than the requirement that pending final decision it provide Medicaid benefits to those medically needy who have transferred their excess assets. The balance of hardships therefore would tip decidedly toward plaintiffs if relief were denied.

Since the plaintiffs have satisfied the essential requirements for issuance of preliminary relief, *Jackson Dairy Inc. v. H.P.*

—Footnote continued from preceding page

> "The gift or sale for less than value of an asset will, under the provisions of the bill, be presumed to have been for purposes of establishing medicaid eligibility unless the individual submits adequate evidence to rebut that presumption.
>
> "The committee intends that this authority would be administered by the States even though other elements of medicaid eligibility may be determined by the Social Security Administration under the agreements entered into pursuant to section 1634 of the Social Security Act. It is expected, however, that the Social Security Administration would agree to reasonable State requests for referral of SSI applicants to appropriate State or county agencies for determination of this additional eligibility factor.
>
> "The committee emphasizes that the provision is aimed at abusive situations where assets are sold for substantially less than their fair market value. It is not intended, for example, that the provision would be used to call into question the sale of a piece of land for $1,000 or $2,000 in which the sale price may fall short of the agency's estimate of fair market value by $100 or $200."

See also S. Rept. 95-1111, 95th Cong., 2d Sess. 24 (1978) (to accompany H.R. 5285).

Hood & Sons, 596 F.2d 70, 72 (2d Cir. 1978); *Caulfield v. Board of Education*, 583 F.2d 605, 610 (2d Cir. 1978); *Sockwell v. Maloney*, 554 F.2d 1236 (2d Cir. 1977) (denial of benefits), and no abuse of discretion on the part of the district court is shown, the order of the district court is affirmed and the stay of that order is vacated.

APPENDIX C — STATUTES AND REGULATIONS INVOLVED

Statutes Involved

42 USC §1396a:

"§1396a. State plans for medical assistance -- Contents

"(a) A State plan for medical assistance must—

* * *

(10) provide—

"(A) for making medical assistance available to all individuals receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter;

"(B) that the medical assistance made available to any individual described in clause (A)—

(i) shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual, and

(ii) shall not be less in amount, duration, or scope than the medical assistance made available to individuals not described in clause A; and

"(C) if medical assistance is included for any group of individuals who are not described in clause (A) and who do not meet the income and resources requirements of the appropriate State plan, or the supplemental security income program under subchapter XVI of this chapter, as the case may be, as determined in accordance with standards prescribed by the Secretary—

(i) for making medical assistance available to all individuals who would, except for income and resources, be eligible for aid or assistance under any such State plan or to have paid with respect to them supplemental security income benefits under

subchapter XVI of this chapter, and who have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical and remedial care and services, and

(ii) that the medical assistance made available to all individuals not described in clause (A) shall be equal in amount, duration, and scope;

* * *"

New York Social Services Law:

"§366. Eligibility

"1. Medical assistance shall be given under this title to a person who requires such assistance and who

* * *

"(e) has not made a voluntary transfer of property (i) for the purpose of qualifying for such assistance, or (ii) for the purpose of defeating any current or future right to recovery of medical assistance paid, or for the purpose of qualifying for, continuing eligibility for or increasing need for medical assistance. A transfer of property made within eighteen months prior to the date of application shall be presumed to have been made for the purpose specified in subparagraph (i); a transfer of property that would be exempt from consideration under this title, made within eighteen months prior to the date of application without fair and reasonable consideration or made, without prior approval of the social services official, at any time after the application or determination of eligibility, shall be deemed to have been made for one or more of the purposes specified in subparagraph (ii) hereof. The social services official shall approve such an assignment or transfer if he determines based on the transfer agreement that the applicant or recipient will receive fair and reasonable consideration for such transfer. Such consideration shall be applied as a resource available to meet the person's medical needs as it becomes

available unless all or a part of it subsequently qualifies as exempt property under subdivision two of this section."

Federal Regulation 42 C.F.R. §435.401

* * *

(c) The agency must not use requirements for determining eligibility for optional coverage groups that are—

(1) For families and children, more restrictive than those used under the State's AFDC plan; and

(2) For aged, blind, and disabled individuals, more restrictive than those used under SSI, except for individuals receiving an optional State supplement as specified in §435.230 or individuals in categories specified by the agency under §435.121.

* * *

Regulations of the State Department of Social Services Involved:

"360.8 Transfer of property. (a) In determining eligibility for medical assistance, if a transfer or assignment of real or personal property has been made within 18 months prior to the date of application or at any time after a determination of eligibility without the prior approval of the social services official, such transfer or assignment shall be presumed to have been made for the purpose of qualifying for such assistance, or for the purpose of defeating any current or future right to recovery of medical assistance paid.

"(b) If such transfer or assignment was made within 18 months prior to the date of application or at any time after a determination of eligibility without the prior approval of the social services official for medical assistance, the applicant shall prove to the satisfaction of the social services official that such transfer or assignment was a normal transaction not done for the purpose of qualifying for medical assistance.

"(c) If the transfer or assignment is found to have been made for the purpose of qualifying for medical assistance, or for the purpose of defeating any current or future right to recovery of medical assistance paid, such assistance shall be denied.

"(d) The social services official shall approve such assignment or transfer if he determines, based on the transfer agreement, that the applicant or recipient will receive fair and reasonable consideration for such transfer. Such consideration shall be applied as a resource available to meet the person's medical needs as it becomes available, unless all or part of it subsequently qualifies as exempt property under section 366.2 of the Social Services Law."

APPENDIX D — AGREEMENT BETWEEN SECRETARY OF HEALTH, EDUCATION AND WELFARE AND STATE OF NEW YORK

SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED
(Agreement with the State Pursuant to Section 1634 of the Social Security Act)

AGREEMENT

Between

The Secretary of Health, Education, and Welfare

and

The State of New York

The Secretary of Health, Education, and Welfare, hereinafter referred to as the Secretary, and the State Department of Social Services hereinafter referred to as the State, pursuant to section 1634 of the Social Security Act (providing for Federal determinations of eligibility for medical assistance in the case of aged, blind, or disabled individuals who are eligible for medical assistance under the State's plan approved under title XIX of the Social Security Act) hereby agree to the following:

Article I
DEFINITIONS

For purposes of this agreement—

A. The term "Secretary" means the Secretary of Health, Education, and Welfare or his delegate.

B. The term "State" means the State of New York, including any subdivision thereof, acting through the Department of Social Services.

C. The term "Act" means the Social Security Act.

D. The term "supplementary payment" means the money payment determined to be payable by the Secretary on behalf of

the State in accordance with the provisions of the agreement between the Secretary and the State for Federal administration of such State supplementary payments pursuant to section 1616 of the Act or the money payment determined to be payable by the Secretary on behalf of the State in accordance with the provisions of section 212 of P.L. 93-66.

E. The term "basic Federal payment" means the money payment determined to be payable by the Secretary in accordance with section 1611 of the Act and section 211 of P.L. 93-66.

F. The terms "eligible individual" and "eligible spouse" shall have the same meaning as they have when used in title XVI of the Act and in regulations and policies prescribed thereunder by the Secretary.

G. The term "supplemental security income program" means the Federal program of Supplemental Security Income for the Aged, Blind, and Disabled established by section 301 of the Social Security Amendments of 1972, P.L. 92-603, and amended and modified by P.L. 93-66, and administered by the Social Security Administration.

H. The term "Medicaid" means medical assistance provided by the State under the State plan approved under title XIX of the Act.

Article II

FUNCTIONS TO BE PERFORMED BY THE SECRETARY

The Secretary shall:

A. Make determinations (including redeterminations) of Medicaid eligibility on behalf of the State with respect to in-

dividuals residing in the State who are receiving or eligible to receive basic Federal payments or Federally administered supplementary payments, or both.

B. Make redeterminations of eligibility for Medicaid as frequently as redeterminations are made with respect to eligibility for basic Federal payments or federally administered State supplementary payments, or both.

C. Send to the State on a timely basis notifications of such determinations and redeterminations of Medicaid eligibility in a manner mutually agreed upon by the Secretary and the State.

D. Furnish to the State, at its request, copies of the title XVI applications (or the data contained therein which is relevant to Medicaid eligibility) and other related and necessary information secured in connection with such applications in cases where the individuals are determined to be not eligible for basic Federal payments, or federally administered supplementary payments, or both, to assist the State in carrying out its functions under its Medicaid program.

E. Notify the State of status changes with respect to individuals determined to be eligible for Medicaid pursuant to paragraph A of this article.

F. Conduct such studies and evaluations as the State may request; provided, however, that (1) the costs of such studies and evaluations shall be borne by the State, and (2) the Secretary determines that any such study or evaluation requested by the State is in the interest of effective and efficient administration of the supplemental security income program.

G. Conduct studies and evaluations which he determines to be necessary to ensure effective and efficient administration of the supplemental security income program, and provide periodic reports thereon to the State.

H. In carrying out the functions set forth in this article, establish procedures to detect and, where appropriate, investigate fraud or program abuse and make recommendations to the State for the disposition of such cases. This provision shall be understood not to preclude the Secretary from taking appropriate action where the fraud or abuse may constitute an offense committed against the United States.

I. Perform such other functions as may be mutually agreed upon in order to carry out the provisions of this agreement.

Article III
FUNCTIONS TO BE PERFORMED BY THE STATE

The State shall:

A. In accordance with article IV, pay the Secretary for the services performed under article II as described in Appendix A (Schedule of Data).

B. Provide written notices of the Secretary's Medicaid determination to individuals covered by such determinations.

C. Continue to perform the functions it has been carrying out under its State plan approved under title XIX of the Act prior to the date of this agreement excepting those listed in article II above, including making determinations of retroactive eligibility for Medicaid.

D. Perform such other administrative functions as are necessary to carry out the terms of this agreement.

Article IV
COSTS

It is the general intent of this agreement that the Secretary in performing his functions and duties under this agreement shall be paid an amount equal to one-half of the administrative costs

incurred which are additional to the costs he incurs in carrying out the supplemental security income program established under title XVI of the act and administering the State's program of supplementary payments. Therefore, in determining and establishing the costs referred to in article III of this agreement, the Secretary shall take into account only such administrative costs incurred by him that are additional to the cost of carrying out his functions under the Supplemental Security Income Program (including federally administered supplementary payments). The Secretary shall determine the amount of these costs and invoice the State periodically.

If the Secretary and the State are unable to agree upon any items in dispute, an official designated by the Secretary shall make an initial determination and inform the State of his determination with a full explanation thereof. The Secretary shall review the initial determination if a written request is filed with him by the State within 90 days after notification to the State of such determination. On the basis of the evidence obtained by or submitted to the Secretary, he shall render a final decision affirming, modifying, or reversing such initial determination. In notifying the State of his decision, the Secretary shall state the basis thereof. In connection with the Secretary's review, the State shall be afforded an opportunity to be heard and to offer evidence in support of its position. Pending the final decision of the Secretary, the State shall proceed diligently with the performance of this agreement. The final decision of the Secretary upon such review shall be conclusive as to any question of fact in connection with his final decision. The delegate of the Secretary who makes the final decision shall not be the same delegate who made the initial determination on behalf of the Secretary.

APPENDIX D — Agreement Between Secretary of Health, Education and Welfare and State of New York

Article V
LIMITATION OF LIABILITY

The Secretary shall not be responsible for any financial loss incurred by the State, whether directly or indirectly, through the use of any data furnished pursuant to this agreement.

Article VI
CONFIDENTIAL NATURE AND LIMITATION ON USE OF INFORMATION AND RECORDS

The Secretary and the State shall adopt policies and procedures to ensure that information contained in their respective records and obtained from each other or from others in carrying out their functions under this agreement shall be used by them and disclosed solely as provided in section 1106 of the Act and the regulations prescribed thereunder.

Article VII
TERM OF AGREEMENT

This agreement shall begin on January 1, 1974 and end on June 30, 1974. It will automatically be renewed for successive periods of one year unless the State or the Secretary gives written notice not to renew at least 120 days before the end of the current period.

Article VIII
TERMINATIONS AND MODIFICATION OF AGREEMENT

A. This agreement may be terminated or modified in writing at any time by mutual consent of the parties hereto.

B. The Secretary or the State may terminate this agreement at any time upon 120 days written notice to the other party.

C. Nothing in this agreement shall be construed to preclude the Secretary from terminating this agreement if the State fails to comply with the terms of this agreement (which shall include the failure of the State to make payments in a timely manner under article IV) and fails to cure such noncompliance, or request an initial determination under article IV of this agreement, within a period of 30 days (or such longer period as the Secretary may allow) after provision by the Secretary of notice explaining the grounds for the proposed termination.

Article IX
APPENDIX

Appendix A (Schedule of Data) attached hereto is made a part of this agreement.

The attached addendum is hereby incorporated into and made a part of this agreement.

In Witness Whereof, the parties hereby execute this agreement this Thirtieth day of November, 1973.

THE SECRETARY OF HEALTH
EDUCATION, AND WELFARE

BY /s/ JOSEPH J. KELLY
SSI Regional Commissioner
New York City Region
(TITLE)

(STATE)

BY /s/ ABE LAVINE
State Commissioner of Social Services
(TITLE)

1450 Western Avenue
Albany, New York 12203
(ADDRESS)

APPENDIX D — Agreement Between Secretary of Health, Education and Welfare and State of New York

APPROVED JAN 7 BY
/s/ THOMAS J MAHON
—— Commissioner (?)

I, Louis J. Lefkowitz, certify that I am the Attorney General of the State of New York, that Abe Lavine, who signed this agreement on behalf of the State, was then Commissioner of Social Services of said State; and that he is authorized to enter into this agreement on behalf of the State and that there is authority under the laws of the State of New York to carry out all the functions to be performed by the State as provided herein and comply with the terms of this agreement.

/s/ LOUIS J. LEFKOWITZ
Attorney General

APPENDIX A

SCHEDULE OF DATA

The data to be furnished to the State under this agreement are as follows:

Data Element	***Description***	***Frequency***
Field 43	*Third Party Insurance Indicator*	*Weekly on New Claims*
Field 44	*Retroactive Medicaid Indicator*	*Weekly on New Claims*

ADDENDUM

This addendum is hereby made a part of this agreement. The provisions of this addendum prevail over the terms contained in the body of the agreement.

APPENDIX D — Agreement Between Secretary of Health, Education and Welfare and State of New York

1. Page 6, Article IV second paragraph — replace this paragraph with the following:

"E. If the Secretary and the state are unable to agree upon any item in dispute, an official designated by the Secretary shall make an initial determination and inform the state, in writing, of his determination with a full explanation thereof. The Secretary shall review the initial determination if a written request is filed with him the the state within 90 days after notification to the state of such determination. On the basis of the evidence obtained by or submitted to the Secretary, he shall render a final decision affirming, modifying or reversing such initial determination. In notifying the state of his decision the Secretary shall state the basis thereof. In connection with the Secretary's review, the state shall be afforded an opportunity to be heard and to offer evidence in support of its position. Pending the final decision of the Secretary, the state and the Secretary shall proceed diligently with the performance of this agreement. The final decision of the Secretary upon such review shall be conclusive as to any question of fact in connection with his final decision, unless a court of competent jurisdiction finds such decision not to have been supported by substantial evidence. The previous provision of this paragraph do not preclude consideration by the Secretary of any question of law in connection with decision provided therein, except that nothing in this agreement shall be construed as making final such decisions on a question of law. The delegate of the Secretary who makes the final decision shall not be the same delegate who made the initial determination on behalf of the Secretary. The official designated by the Secretary to make the initial determination will be empowered by the Secretary to make his decision based on his own judgment of the facts, and the law, and this

decision will be final unless appealed by the state within 90 days as provided above.

2. Page 7, Article V should be revised as follows:
"Notwithstanding the preceding sentence the Secretary shall not withhold or refuse to reimburse the state its Federal financial participation under Title XIX for payments made by the state on account of an erroneous medicaid eligibility determination made by the Secretary. This does not include cases of ineligibility which were caused by incorrect data furnished by the state to the Secretary."

3. Page 8, Article VIII (C) should now begin as follows:
"Nothing in this agreement shall be construed to preclude the Secretary from terminating this agreement in less than 120 days if the state fails to comply with the terms of paragraphs A, of Article III of this agreement."

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES
40 NORTH PEARL STREET
ALBANY, N. Y. 12243

BARBARA B. BLUM
COMMISSIONER

April 30, 1980

Dear Secretary Harris:

This letter will notify you in accordance with Article VIII of the Agreement (hereinafter referred to as the "agreement") between the State of New York and the Secretary of Health, Education and Welfare (Secretary), whereby the Secretary pursuant to Section 1634 of the Social Security Act determines eligibility for medical assistance of persons receiving or eligible

to receive Supplemental Security Income payments, is terminated. This termination will, in accordance with Article VIII which requires one hundred and twenty (120) days notice, be effective August 29, 1980.

This action is necessary because the Second Circuit Court of Appeals has held in the case of *Caldwell v. Blum* that New York State cannot enforce a statutory prohibition against transferring assets to qualify for medical assistance against persons who are aged, blind or disabled but financially ineligible for Supplemental Security Income (SSI) benefits. Under State law, the Department's authority to enter into and remain a party to the agreement is conditioned upon its ability to enforce the statutory prohibition against transferring assets to qualify.

By virtue of the Caldwell decision, this State is placed in the impermissible situation of ignoring a statutory mandate should it remain a party to the agreement. Clearly, such a result is not an option.

You should be aware that the Court relied in its decision on DHEW's regulatory requirement that a "contract" State cannot impose supplementary financial eligibility criteria. In our view, this regulation might be amended even at this date to permit the State to apply supplementary eligibility criteria, and thus permit this State's continuation as a party to the agreement. We do not understand the continuing reluctance of DHEW to support our approach. In these times of severe fiscal constraints and reduction of necessary governmental expenditures, we question why DHEW continues on an approach that allows and even encourages people to circumvent reasonable transfer of property requirements in order to qualify for medical assistance. Your position is particularly difficult to grasp, in light of the fact that you continue to support transfer of property legislation which is pending in Congress.

APPENDIX D — Agreement Between Secretary of Health, Education and Welfare and State of New York

As you are aware, there would be a great fiscal impact in federal, state and local dollars if we were to continue in the agreement according to the terms which you require. In light of this fiscal consequence, we are requesting an immediate meeting with you to explore the question of termination of this agreement before the required 120-day notice period has been exhausted. At that meeting we would also be most interested in learning the reasons why you have exercised your discretion so that we have arrived at the result described in this letter.

Sincerely,

/s/BARBARA B. BLUM
Barbara B. Blum
Commissioner

Honorable Patricia Harris
Secretary
Department of Health, Education
and Welfare
Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Washington, D. C. 20201

APPENDIX E — DECISION OF COURT OF APPEALS, NINTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROSSYE DAWSON, individually and on behalf of all others similarly situated,

Plaintiff-appellant,

vs.

BEVERLEE A. MYERS,* et al.,

Defendants-Appellees.

D.C. No. C 78-2350 MML

On Appeal from the United States District Court for the Central District of California The Honorable Malcolm M. Lucas, Presiding

Before: WRIGHT and ANDERSON, Circuit Judges, and SOLOMON,** District Judge.

J. BLAINE ANDERSON, Circuit Judge:

This is a class action challenging the State of California's transfer of assets rule which was relied upon to deny Medi-Cal benefits to members of the class. In short, this rule denies Medi-Cal benefits to any individual who has transferred assets so as to qualify under the financial eligibility requirements for Medi-Cal. The class members argue that the transfer rule conflicts

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*Beverlee A. Myers, the Director of the California State Department of Health Services, is the successor to Edwin W. Beach, the originally named defendant. Since Myers succeeded Beach prior to when this appeal was taken, we make the substitution under Fed. R. Civ. P. 25(d)(1) rather than Fed. R. App. P. 43(c)(1).

**The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

with the federal Medicaid statutes and regulations, and they also challenge the rule's constitutionality based on due process and equal protection grounds. The court below rejected all of these arguments and upheld the transfer rule. We believe that the district court reached the correct result and affirm.

I. *BACKGROUND*

A. *Medicaid*

Title XIX of the Social Security Act established the Medicaid program. 42 U.S.C. §1396 *et seq.* This cooperative federal-state program is designed to provide medical assistance to certain classes of individuals who are in need of such assistance. Although states are not required to participate, if they choose to do so they must develop a plan which conforms to the federal guidelines. 42 U.S.C. §1396(b). Despite the extensive federal standards (42 U.S.C. §1396a), the individual states are given wide discretion in the administration of their local programs. *Norman v. St. Clair,* 610 F.2d 1228, 1230 (5th Cir. 1980). After a state's plan is approved by the Secretary of Health, Education and Welfare, the state then receives reimbursement for a portion of the funds which are expended. 42 U.S.C. §1396.

A state which has chosen to adopt a Medicaid program has the option of deciding whether it should provide benefits to only one or to both of the statutorily-defined groups of needy persons. States participating in the program *must* provide assistance to the group which is referred to as the *categorically needy.*[1] 42

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[1]The regulations define this group as follows:

> "Categorically needy" means aged, blind or disabled individuals or families and children who are otherwise eligible for medicaid and who meet the financial eligibility requirements for AFDC, SSI, or an optional State supplement;"

42 C.FR. § 435.4.

U.S.C. §1396a(10)(A). Generally, in order to be considered *categorically needy*, an individual must be receiving financial assistance, or be financially eligible for such assistance, under Title IV-A of the Social Security Act (Aid to Families with Dependent Children, referred to as AFDC) or Title XVI of the Social Security Act (Supplemental Security Income for the Aged, Blind, and Disabled, referred to as SSI).[2]

When they establish their Medicaid program, the states have the option of also providing benefits to the group which is referred to as the *medically needy*. This group covers individuals who would qualify for AFDC or SSI except that they have sufficient income and resources to cover the essentials aside from their medical costs.[3] The *medically needy* begin receiving assistance after they have incurred medical expenses which reduce their income (and assets) below a prescribed level. Thus, the chief distinction between the two groups is that the *categorically needy* have lower incomes and less resources than the *medically needy*.

B. *Medi-Cal*

California, through its Medi-Cal program, has voluntarily chosen to participate in the Medicaid program. In addition, California voluntarily chose to cover the *medically needy* as well

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[2]States have the option of using more restrictive criteria than those used under the AFDC or SSI programs. California has not chosen this option and so this opinion does not deal with those provisions of the Medicaid Act which would then come into play.

[3]The regulations define this group as follows:

> "Medically needy" means aged, blind, or disabled individuals or families and children who are otherwise eligible for medicaid and whose income and resources are above the limits set under the medicaid State plan;"

42 C.F.R. § 435.4.

as the *categorically needy.* California has adopted a comprehensive statutory and regulatory scheme to implement its Medi-Cal program.

As part of its plan, the California legislature adopted what is called a transfer of assets rule. Cal. (Welf. & Inst.) Code §14015.[4] Basically, this prevents persons from qualifying as *medically needy* if they have transferred assets for less than fair consideration within two years prior to their application for assistance. The transfer rule only applies to applicants in the *medically needy* group; it has no application at all to the *categorically needy.*

California has promulgated regulations which, among other things, establish eligibility requirements for the *medically needy* and implement the transfer rule.[5] Under these regulations, an

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[4]The statutory part of the transfer rule provides as follows:

> "The providing of health care under this chapter shall not impose any limitation or restriction upon the person's right to sell, exchange or change the form of property holdings nor shall the care provided constitute any encumbrance on the holdings. However, any transfer of the holdings by gift or, knowingly, without adequate and reasonable consideration, shall be presumed to constitute a gift of property with intent to qualify for assistance and such act shall disqualify the owner for further aid for a period determined under standards established by the director, and in no event for less than half of the period that the capital value of the transferred property would have supplied the person's maintenance needs based on his circumstances at the time of his transfer plus the cost of any needed medical care."

Cal. (Welf. & Inst.) Code § 14015.

[5]The transfer rule is implemented, for the most part, through 22 Cal. Admin. Code §§ 50408, 50409. The first section (§ 50408) states the general conditions for when the transfer of property will not result in ineligibility. The rule and the procedure for overcoming the presumption are then stated in § 50409:

Footnote continued on next page—

individual is eligible as *medically needy* only if his or her assets are valued at $1500 or less. 22 Cal. Admin. Code §50420. An individual's home, income-producing real property, and certain other assets are not counted toward the $1500 limitation. 22 Cal. Admin. Code §§50418, 50425-50439. Although this property is exempt insofar as determining eligibility, it remains potentially subject to California's recovery procedures. That is, after the individual dies, California is entitled to recover the cost of

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—Footnote continued from preceding page

> "(a) Transfer of property shall result in ineligibility for Medi-Cal if the transfer did not meet at least one of the conditions specified in Section 50408 or the transfer was in return for an enforceable life care contract which includes complete medical care.
>
> "(b) Transfer of property without adequate consideration shall result in ineligibility for Medi-Cal if the transfer was made to establish eligibility or to reduce the share of cost.
>
> "(1) It shall be presumed that property transferred without adequate consideration was for the purpose of establishing eligibility or to reduce the share of cost as limited by (2).
>
> "(2) To overcome the presumption, the applicant or beneficiary has the burden of establishing by objective facts, rather than statement of subjective intent, that this presumption is not correct. The applicant or beneficiary shall provide evidence that adequate resources were available at the time of the transfer of property for support and medical care considering such things as the applicant's or beneficiary's age, health, life expectancy, and ability to understand extent of resources.
>
> "(A) The declaration of another purpose, such as to avoid probate, by itself, shall not be sufficient to overcome the presumption. A showing that the sole purpose of the transfer was for reasons other than to establish eligibility or to reduce the share of cost shall be supported by evidence such as that specified above.
>
> "(B) The establishment of the fact that the applicant or beneficiary did not have specific knowledge of the availability or benefits of the Medi-Cal program is not sufficient to overcome the presumption."

medical assistance it provided to the individual from the assets (including both exempt and nonexempt property) which are left in the individual's estate.

Under the regulations which implement the transfer rule, any transfer of assets (including exempt property) for less than adequate consideration creates a rebuttable presumption that the transfer was made for the purpose of establishing eligibility. Unless the applicant rebuts the presumption, the state can deny benefits on this basis.

C. *Facts*

Dawson, who originally filed this action, has died. Two other individuals, Beltran and Manahan, intervened. Beltran, who is 87, lives in an extended care facility. Manahan, who is 85, lives in a convalescent home. Both Beltran and Manahan were *medically needy* and otherwise qualified to receive Medi-Cal benefits. However, both were denied benefits based on the fact that they had transferred assets for less than adequate consideration prior to applying for Medi-Cal. Neither was able to overcome the presumption of ineligibility resulting from these transfers.

In their complaint, Beltran and Manahan (referred to as appellants), on behalf of themselves and others similarly situated, sought declaratory and injunctive relief invalidating and enjoining the California transfer rule. In addition, the appellants sought reimbursement for those amounts which they had been forced to pay because of the state's transfer rule. The district court certified a class consisting of all those who had been denied Medi-Cal benefits based on California's transfer rule.

On May 10, 1979, the district court granted California's motion for summary judgment and denied the cross motion filed by the appellants. The court entered findings of fact and conclusions of

law which held that the state's transfer rule did not conflict with the federal statutory and regulatory framework, nor did it amount to a denial of due process or equal protection. The appellants then brought this appeal.[6]

II. *DISCUSSION*

The appellants make five distinct arguments against California's transfer rule. They claim that it creates an irrebuttable presumption in violation of the due process clause. Since the rule only applies to the *medically needy*, they contend that it also violates the equal protection clause. Furthermore, the appellants claim that the transfer rule conflicts with two different sections of the federal statutes (42 U.S.C. §§1346a(a)(10)(C), 1396a(a)(17)(B), as well as one section of the federal regulations (42 C.F.R. §435.401). We address the challenges based on the federal statutes and regulations first because if the appellants' arguments are correct, we would not need to reach the constitutional issues. *Dandridge v. Williams*, 397 U.S. 471, 475-476, 25 L.Ed.2d 491, 90 S.Ct. 1153 (1970). Moreover, in addressing appellants' arguments, the cardinal principle of statutory construction must be kept in mind, that is, statutes should be construed to avoid constitutional questions. *See Swain v. Pressley*, 430 U.S. 372, 378 n.11, 97 S.Ct. 1224, 51 L.Ed.2d 411 (1977)

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[6]The district court concluded that it had jurisdiction under 28 U.S.C. § 1343(3) & (4) (civil rights jurisdiction) and under 28 U.S.C. § 1331 (federal question jurisdiction). It is unclear whether jurisdiction was properly invoked under 28 U.S.C. § 1343. *See Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979); *Doe v. Klein*, 599 F.2d 338 (9th Cir. 1979). Nevertheless, the amount in controversy exceeds $10,000 and so the district court did clearly have federal question jurisdiction (28 U.S.C. § 1331). *Brown v. Stanton*, F.2d No. 79-1459, slip op. 2 n.1 (7th Cir. 1980); *see Chapman, supra*, 60 L.Ed.2d at 515. Since the appellants filed a timely notice of appeal from the final judgment, this court has jurisdiction to consider the appeal under 28 U.S.C. § 1291.

APPENDIX E — Decision of Court of Appeals, Ninth Circuit

A. *42 U.S.C. §1396a(a)(10)(C)*

Appellants' primary argument is that the California transfer rule conflicts with 42 U.S.C. §1396a (a)(10)(C), which requires states providing benefits to the *medically needy* to cover "all individuals who would, except for income and resources" be eligible for SSI (and therefore come under the *categorically needy* classification), "and who have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical and remedial care and services."[7] The appellants attribute the following meaning to §1396(a)(10)(C): "except for the definitional distinction that the medically needy may have higher income and resource levels, the

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[7]This statute provides, in part, as follows:

> "A state plan for medical assistance must —provide—
>
> "(C) if medical assistance is included for any group of individuals who are not described in clause (A) and who do not meet the income and resources requirements of the appropriate State plan, or the supplemental security income program under subchapter XVI of this chapter, as the case may be, as determined in accordance with standards prescribed by the Secretary—
>
> "(i) *for making medical assistance available to all individuals who would, except for income and resources, be eligible for aid or assistance under any such State plan or to have paid with respect to them supplemental security income benefits under subchapter XVI of this chapter, and who have insufficient (as determined in accordance with comparable standards) income and resources to meet the costs of necessary medical and remedial care and services, and*
>
> "(ii) that the medical assistance made available to all individuals not described in clause (A) shall be equal in amount, duration, and scope;
>
> (emphasis added to show that portion of the statute which the appellants rely upon)

42 U.S.C. § 1396a(a)(10).

states must use the same rules for the medically needy as for the categorically needy."

Under the Social Security Act, an SSI applicant whose assets exceed the eligibility levels may dispose of the excess assets in order to become eligible for SSI payments. 42 U.S.C. §1382b(b). This has been administratively interpreted to permit the transfer of the excess assets for less than adequate consideration or as a gift. Social Security Claims Manual §12507(a). According to the appellants, since transfer rules cannot be applied to SSI applicants (i.e., the *categorically needy*), they therefore cannot be applied to the *medically needy.*

The court below rejected the appellants' reasoning and concluded that the California transfer rule did not conflict with §1396a(a)(10)(C). The court agreed with the appellants that California could not employ any substantive eligibility requirements on the *medically needy* which were more restrictive than those used for the *categorically needy.* Nevertheless, the court characterized the transfer rule as a collateral or procedural eligibility requirement which was permissible under the Social Security Act. While we agree with the district court that the California transfer rule does not conflict with §1396a(a)(10)(C), we do not accept the semantic distinction which was relied upon.

We believe that the California transfer rule is properly characterized as a substantive eligibility requirement. It directly applies to the state's determination of whether an applicant's assets exceed the eligibility requirements.

In considering the appellant's argument, we must first turn to the language of the statute itself. Obviously, the face of this

statute says nothing about prohibiting transfer rules such as California's.[8]

The portion of the statute with which we are concerned may be divided into two parts. The first part provides that the medically needy group includes all who would, except for their income and resources, be eligibile for SSI. The second part provides that the medically needy group includes all who have insufficient income and resources, as determined under comparable standards, to pay for their medical care.

The first part specifically excepts income and resources when it equates SSI eligibility to the *medically needy* eligibility requirements. And so, while this provision does extend all of the SSI eligibility requirements to the *medically needy*, it does not do so for those which deal with the applicant's income and resources. Were this not the case, then there would be no distinction between the two groups. There can be no question but that the California transfer rule is an eligibility requirement which pertains to the applicant's income and resources. It therefore clearly comes within the exception to the first clause of the statute.

The second part may be read as requiring that the evaluation of the applicant's income and resources be determined by using comparable standards. Since an SSI applicant is apparently specifically allowed to transfer assets in the manner which is

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[8]At one point, appellants suggest that states can only use requirements which are explicitly authorized by the federal statute. We were unable to find any provision of the statute which said this. In the absence of some expression by Congress to the contrary, we decline to read such a prohibition into a statute which is, after all, establishing a *cooperative* federal state program. *See, New York Department of Social Services v. Dublino*, 413 U.S. 405, 93 S.Ct. 2507, 37 L.Ed.2d 688 (1973) ("It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of an intention to do so." 413 U.S. at 413, *quoting Schwartz v. Texas*, 344 U.S. 199, 202-203, 73 S.Ct. 232, 97 L.Ed. 231 (1952)).

prohibited by the California transfer rule, we are faced with an inconsistent standard. Nevertheless, this does not make the California rule necessarily in conflict with this part of the statute. After all, the statute only requires the standards to be comparable, not identical. Comparable only means that there must be enough similar characteristics or qualities to make comparison appropriate. Webster's Third New International Dictionary, G.&C. Merriam Co. (1976). The other standards which are used for determining financial eligibility are similar enough to invite comparison. We therefore cannot say that the standards used by California to determine eligibility into the *medically needy* group (including the transfer rule) are not comparable to those which are used under the SSI program.

In support of their argument, the appellants claim that HEW, the agency charged with administering the Medicaid program, has interpreted §1396a(a)(10)(C) in the same manner as they would have this court. Apparently, three different HEW Regional Medical Directors have written letters stating that state transfer rules are inconsistent with §1396a(a)(10)(C) because they impose more restrictive eligibility requirements on the *medically needy* than on SSI applicants. *See Fabula v. Buck,* 598 F.2d 869, 873 (4th Cir. 1979). Although this court generally defers to an administrative agency's interpretation of the law which it is charged with administering, we are by no means bound by the agency's interpretation. *Pacific Coast Medical Enterprises v. Harris,* F.2d , slip op. 2516, 2525-2526 (9th Cir., March 28, 1980); *Baker v. United States,* 613 F.2d 224, 226-227 (9th Cir. 1980).

In the present case, we not only refuse to follow the letter interpretations, but we also refuse to attach any weight to them. Initially, we are convinced that our interpretation of §1396a(a)(10)(C) is correct, that is, the California transfer rule does not conflict with the statute. This court's "deference does not extend to agencies' construction which conflict with

statutory directives." *Pacific Coast, supra,* slip op. at 2526. While regional administrators may be writing letters disapproving of state transfer rules, HEW as a whole has approved California's Medi-Cal program (and the transfer rule). By this approval, and by not taking any action against California because of the transfer rule, HEW "has in effect expressed its view that the plan is in compliance with applicable statutory and regulatory requirements." *Michael Reese Physicians & Surgeons, S.C. v. Quern,* 606 F.2d 732, 735-736 (7th Cir. 1979). Based on the preceding, not only do we believe that the letter rulings should not be followed, but we also believe that HEW's general acceptance of California's Medi-Cal program supports our interpretation.

As further support for their argument under §1396a(a)(10)(C), the appellants rely upon the subsequent legislative history of the Medicaid program. In 1978, as part of the Medicare-Medicaid Administrative and Reimbursement Reform Act, the Senate Finance Committee proposed an amendment to the Medicaid statute which would have specifically required states to adopt transfer rules such as California's. S. Rep. No. 95-1111, 95th Cong., 2d Sess., 24-25 (1978). Apparently, relying upon what we have already concluded was an erroneous agency interpretation of §1396a(a)(10)(C), the Senate Committee said that the states were not able to adopt transfer rules under present law. *Id.* We recognize that the pronouncements of legislative committees as to the meaning of previously enacted statutes are often afforded considerable deference. *Sioux Tribe of Indians v. United States,* 316 U.S. 317, 329-330, 62 S.Ct. 1095, 86 L.Ed. 1501 (1942). Nevertheless, courts are not bound by such pronouncements and it has been suggested that subsequently expressed Congressional views should not be relied upon at all. *Mathews v. Weber,* 423 U.S. 261, 272 n.7, 96 S.Ct. 549, 46 L.Ed.2d 483 (1976). Since the Senate Committee was apparently relying upon the erroneous administrative interpretation, and because we remain convinced that our interpretation of §1396a(a)(10)(C) is correct, we choose

not to accord any deference to the latter legislative pronouncements.

We conclude that California's transfer rule does not conflict with 42 U.S.C. §1396a(a)(10)(C).

B. *42 U.S.C. §1396a(a)(17)(B)*

The appellants argue that the California transfer rule violates 42 U.S.C. §1396a(a)(17)(B).[9] This section requires states to only

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[9]This statute provides in part as follows:

> "A state plan for medical assistance must—
>
> "include reasonable standards (which shall be comparable for all groups and may, in accordance with standards prescribed by the Secretary, differ with respect to income levels, but only in the case of applicants or recipients of assistance under the plan who are not receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV of this chapter, and with respect to whom supplemental security income benefits are not being paid under subchapter XVI of this chapter based on the variations between shelter costs in urban areas and in rural areas) for determining eligibility for and the extent of medical assistance under the plan which (A) are consistent with the objectives of this subchapter, (B) *provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient and* (in the case of any applicant or recipient who would, except for income and resources, be eligible for aid or assistance in the form of money payments under any plan of the State approved under subchapter I, X, XIV, or XVI, or part A of subchapter IV, or to have paid with respect to him supplemental security income benefits under subchapter XVI of this chapter as would not be disregarded (or set aside for future needs) *in determining his eligibility for such aid, assistance, or benefits* . . .
>
> • • •"
>
> (emphasis added to show that portion of the statute which the appellants rely upon)

42 U.S.C. § 1396a(a)(17).

consider the income and resources which are "available" to the applicant in determining eligibility. The California transfer rule assumes the availability of assets, which, according to the appellants, are no longer available to the applicant.

The appellants' argument may be correct under what we believe is an overly rigid and literal interpretation of the term "available" under §1396a(a)(17)(B). We refuse to interpret this statute as equating available with present record title. This would be inconsistent with the approach which is taken under the Medicaid program.

Initially, "we do not lose sight of the [Medicaid] statute's strong emphasis upon flexibility in determining eligibility." *Norman, supra,* 610 F.2d at 1240. In another context the Supreme Court interpreted §1396a(a)(17) as conferring broad discretion on the states to adopt reasonable standards. *Beal v. Doe,* 432 U.S. 438, 444, 97 S.Ct. 2366, 53 L.Ed.2d 464 (1977).[10] The California transfer rule presumes that an asset remains available to an applicant after the applicant has given it away, or sold it for less than adequate consideration. We find nothing in the plain language of this statute which would prohibit such a rule, nor is there anything in the legislative history which equates "available" as requiring present record title or ownership.

To the extent that the regulations address the definition of "available," they support our interpretation. Under the regulations, a state is allowed to examine an applicant's income and assets for a six-month prospective period in determining eligibility. 42 C.F.R. §§435.831(a), 435.845(b). Since a state is authorized to consider future assets, it must follow that it should also be allowed to consider those assets which have been recently

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[10]The Supreme Court was considering the extent of medical assistance which the states were required to provide. *Beal, supra,* 432 U.S. at 444.

disposed of under circumstances which indicate that the purpose was to qualify for public medical assistance.

We hold that California's transfer rule does not conflict with 42 U.S.C. §1396a(17)(B).

C. *42 C.F.R. §435.401*

Appellants also claim that the California transfer rule is inconsistent with 42 C.F.R. §435.401.[11] This regulation provides that a state Medicaid agency cannot use requirements for determining eligibility for the *medically needy* which are "more restrictive" than those used for the *categorically needy.* Since the California transfer rule is a more restrictive requirement, the appellants reason that it therefore violates §435.401.

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[11]This regulation provides as follows:

> "(a) A medicaid agency may not impose any eligibility requirement that is prohibited under title XIX of the Act.
>
> "(b) The agency must base any optional group covered under subparts B and C of this part on reasonable classifications that do not result in arbitrary or inequitable treatment of individuals and groups and that are consistent with the objectives of title XIX.
>
> "(c) *The agency must not use requirements for determining eligibility for optional coverage groups that are—*
>
> > "(1) For families and children, more restrictive than those used under the State's AFDC plan; and
> >
> > "(2) *For aged, blind, and disabled individuals, more restrictive than those used under SSI,* except for individuals receiving an optional State supplement as specified in § 435.230 or individuals in categories specified by the agency under § 435.121."
>
> (emphasis added to show that portion of the regulation which the appellants rely upon)

42 C.F.R. § 435.401.

While we agree that the California transfer rule imposes a more restrictive requirement on the *medically needy*, we do not believe that §435.401 has any bearing on the validity of financial eligibility requirements such as the transfer rule.

First of all, if we were to give §435.401 the broad reading attributed to it by the appellants, we would be reading an inconsistency into the federal statutory and regulatory framework. The Medicaid program is designed to provide benefits to two differently situated groups. The *medically needy* are those individuals who have more available income and resources than the *categorically needy*. By definition, different financial requirements apply to the *medically needy* than to the *categorically needy*. Only when §435.401 is read as not applying to financial requirements, such as the transfer rule, can it be viewed consistently with the other Medicaid statutes and regulations.

After all, §435.401 is merely one of five sections under the general heading entitled: "*Subpart E — General Eligibility Requirements.*" There is absolutely no discussion of financial eligibility requirements in any of the other sections of this subpart. Instead, the focus of all of the sections is directed toward much more general concerns, such as eligibility requirements which are based on citizenship, alienage, or state residence. In addition, a thorough reading of the statutes and regulations shows that the sections of Subpart E parallel the subsections of 42 U.S.C. §1396a(b). From this it is apparent that Subpart E (including §435.401) was designed to carry out the statutory mandate of 42 U.S.C. §1396a(b) which does not involve financial eligibility requirements. *See, e.g., Pacific Coast, supra*, slip op. at 2526.[12] And finally, there are three specific subparts

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[12]In *Pacific Coast, supra*, this court noted that "[e]xisting regulations must be construed in light of the statutory mandates under which they issue." Slip op. at 2526.

which cover the financial eligibility requirements. Subpart G states the general financial eligibility requirements, Subpart H states the financial eligibility requirements for the *categorically needy*, and Subpart I states the financial eligibility requirements for the *medically needy*. These specific and detailed guidelines for financial eligibility requirements must control over the general rule of §435.401.

We conclude that 42 C.F.R. §435.401 does not apply to financial eligibility requirements and therefore there is no conflict between it and the California transfer rule.

D. *Due Process*

In their opening brief, the appellants claim that the transfer rule creates an irrebuttable presumption in violation of the due process clause. In their reply brief, the appellants call it an "effectively" irrebuttable presumption. We disagree with either characterization and find that the transfer rule creates a rebuttable presumption which is permissible under the due process clause.

The California transfer rule obviously does not create an irrebuttable presumption. After all, the regulations expressly provide that the presumption may be overcome by evidence that the applicant had adequate resources for support and medical care at the time of the transfer of property. 22 Cal. Admin. Code §50409(b)(2). Such a determination can be based on "such things as the applicant's . . . age, health, life expectancy, and ability to understand [the] extent of [his or her] resources." *Id.* This would mean that if a person was in good health at the time of the transfer, then the presumption might be rebutted because the person would have no reason to anticipate any large expenditure for medical care and support.

The appellants argue that it is an "effectively" irrebuttable presumption because the applicant is precluded from relying on

his or her subjective intent. According to the appellants, this excludes the two most likely explanations for this type of transfer, which are: (1) the applicant was unaware of Medi-Cal benefits, and/or (2) a desire to avoid probate. While the state could have considered these subjective considerations, we cannot say that the failure to do so creates a due process violation. California's objective test for determining how the presumption can be overcome does not create an effectively irrebuttable presumption which might run afoul of the due process clause.

E. *Equal Protection*

The appellants' final argument is based on equal protection grounds. They claim that there is no rational basis for treating the *medically needy* any differently from the *categorically needy.* According to the appellants, the *medically needy* are in the identical situation as the *categorically needy,* that is, in need of medical care and without sufficient income or resources to pay for it. Since the "transfer of assets" rule only applies to the *medically needy,* the appellants argue that it violates the equal protection clause because there is no reasonable basis for the disparate treatment between the two groups.

We fail to see how the application of the transfer of assets rule to the *medically needy* group gives rise to even a colorable constitutional claim under the equal protection clause.

Initially, we note that the two groups are not identically situated. By definition, the *categorically needy* have less income and resources than the *medically needy.* Furthermore, Congress has obviously viewed the two groups differently, or, at least, as not being identically situated. Why else would Congress have left the decision to provide benefits to the *medically needy* entirely up to the individual state? It must be remembered that the *categorically needy* receive benefits regardless of whether a state adopts a medicaid program under Title XIX. However, the

medically needy only become entitled to benefits if a state first adopts a program, and, secondly, if the state elects to include the *medically needy* group in its benefit program.

In addition, California has a rational basis for its transfer rule. California is confronted with two competing interests, the protection of a limited public treasury, and the provision of benefits to those who are in need. The transfer rule was a reasonable response to these conflicting concerns. Under the rule, benefits are provided to those individuals who, in fact, have a financial need, and benefits are denied to the individuals who have artificially created a need by disposing of assets for less than fair consideration.

We hold that California's transfer rule is rationally related to the legitimate government objectives of protecting the public treasury and discouraging intentional impoverishment so as to qualify under a public assistance program. Any disparate treatment resulting from the application of the rule is sufficiently rational to be upheld against appellants' equal protection challenge. *See Dandridge, supra,* 397 U.S. at 471; *Richardson v. Belcher,* 404 U.S. 78, 83-84, 92 S.Ct. 254, 30 L.Ed.2d 231 (1972); *Sims v. Harris,* 607 F.2d 1253 (9th Cir. 1979).

III. *CONCLUSION*

In upholding the California transfer rule, we recognize that the majority of the courts which have been faced with similar challenges have reached the opposite conclusion. *See, e.g., Caldwell v. Blum,* F.2d , No. 79-7864 (2d Cir. April 10, 1980); *Fabula v. Buck,* 598 F.2d 869 (4th Cir. 1979); *Udina v. Walsh,* 440 F.Supp. 1151 (E.D. Mo. 1977); *Buckner v. Maher,* 424 F.Supp. 366 (D. Conn. 1976), *aff'd* 434 U.S. 898, 98 S.Ct. 290, 54 L.Ed.2d 184; *Owens v. Roberts,* 377 F.Supp. 45 (M.D. Fla. 1974); *contra, Rinefierd v. Blum,* 412 N.Y.S. 2d 526 (App. Div. 1979); *Lerner v. Division of Family Services,* 235 N.W. 2d 478 (Wis.

1975). Nevertheless, for the reasons stated in this opinion, we are convinced that our analysis of the question is correct.

AFFIRMED.[13]

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[13]Appellants also ask this court, providing they prevail on this appeal, to grant the full measure of relief requested in their complaint and provide notice to all class members. Because we affirm the district court, it is unnecessary for us to address the propriety of this request.

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NO. 79-2034

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

ORIGINAL COPY

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

-vs-

ETHEL CALDWELL, individually and on behalf of all other persons similarly situated,

Respondent,

and

ELLA McCULLOUGH, JANET RICHMOND, AGNES GRANT and MURIEL ROTHSTEIN, as next friend of BELLE BARNETT, individually and on behalf of all other persons similarly situated,

Respondents,

and

JAMES L. COVERT, as Commissioner of the Madison County Department of Social Services, MADISON COUNTY, NEW YORK, JOHN L. LASCARIS, as Commissioner of the Onondaga County Department of Social Services, ONONDAGA COUNTY, NEW YORK, JOSEPH P. MENALDINO, as Commissioner of Warren County Department of Social Services, WARREN COUNTY, NEW YORK, ROBERT E. LAUNDREE, as Commissioner of the Essex County Department of Social Services, ESSEX COUNTY, NEW YORK, GABRIEL T. RUSSO, as Commissioner of the Monroe County Department of Social Services, MONROE COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

-vs-

deceased

ANITA PERITO and JAMES PERITO, individually and on behalf of all others similarly situated,

Respondents,

and

LOUIS FRIEDMAN,

Respondent,

and

BLANCHE BERNSTEIN, individually and as Commissioner of the New York City Department of Social Services,

Respondent.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

-vs-

JENNIE LANDERS,

Respondent,

and

JOSEPHINE MANICCIA,

Respondent,

and

DAVID R. ADINOLFI, as Commissioner of the Cortland County Department of Social Services, CORTLAND COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

-vs-

JULIA WHITLOCK,

Respondent,

and

ROBERT WAGNER, as Commissioner of the Tompkins County Department of Social Services, TOMPKINS COUNTY, NEW YORK,

Respondents.

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

Respondents Ella McCullough, Janet Richmond, Agnes Grant, Belle Barnett, James Perito, Jennie Landers, and Josephine Maniccia ask leave to file the attached Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit and to proceed in forma pauperis pursuant to Rule 46. Leave to proceed in forma pauperis was not sought in the courts below except as to respondents James Perito and Jennie Landers, as to whom leave was granted by the district courts.

The affidavits of John McCullough, Janet Richmond, Agnes Grant, Muriel Rothstein, Amelia Schenk, Jenny Landers, and Josephine Maniccia in support of this motion are attached hereto.

RENE H. REIXACH, JR., ESQ.
Counsel of Record for Respondents
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Agnes Grant, Belle Barnett,
James Perito, Jennie Landers
and Josephine Maniccia
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80 West Main Street
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Tel: 716-454-6500

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ETHEL CALDWELL, individually and on behalf of all other persons similarly situated,

Respondent,

and

ELLA MC CULLOUGH, JANET RICHMOND, AGNES GRANT and MURIEL ROTHSTEIN, as next friend of BELLE BARNETT, individually and on behalf of all other persons similarly situated,

Respondents,

and

JAMES L. COVERT, as Commissioner of the Madison County Department of Social Services, MADISON COUNTY, NEW YORK, JOHN L. LASCARIS, as Commissioner of the Onondaga County Department of Social Services, ONONDAGA COUNTY, NEW YORK, JOSEPH P. MENALDINO, as Commissioner of Warren County Department of Social Services, WARREN COUNTY, NEW YORK, ROBERT E. LAUNDREE, as Commissioner of the Essex County Department of Social Services, ESSEX COUNTY, NEW YORK, GABRIEL T. RUSSO, as Commissioner of the Monroe County Department of Social Services, MONROE COUNTY, NEW YORK,

Respondents

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ANITA PERITO and JAMES PERITO, individually and on behalf of all others similarly situated,

Respondents,

and

LOUIS FRIEDMAN,

Respondent,

and

BLANCHE BERNSTEIN, individually and as Commissioner of the New York City Department of Social Services,

Defendant.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

JENNIE LANDERS,

Respondent,

and

JOSEPHINE MANICCIA,

Respondent,

and

DAVID R. ADINOLFI, as Commissioner of the Cortland County Department of Social Services, CORTLAND COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

JULIA WHITLOCK

Respondent,

and

ROBERT WAGNER, as Commissioner of the Tompkins County Department of Social Services, TOMPKINS COUNTY, NEW YORK,

Respondents.

AFFIDAVIT OF RESPONDENT
JOHN McCULLOUGH IN SUPPORT
OF MOTION TO PROCEED
IN FORMA PAUPERIS

CITY OF SYRACUSE)
COUNTY OF ONONDAGA)ss:
STATE OF NEW YORK)

JOHN McCULLOUGH, being duly sworn, deposes and says:

1. That I am the son of respondent, Ella McCullough, in the above entitled case. I make this affidavit in support of motion to proceed in forma pauperis for my mother as she is not above to comprehend these proceedings or this motion.

2. My mother has been a patient at the VanDuyn Home and Hospital in Syracuse, New York, since September 18, 1978. She is senile and unable to care for herself.

3. The current cost of her care at the Van Duyn Home and Hospital is in excess of $960.00 per month.

4. My mother has no income aside from the $250.10 in Social Security benefits she received each month. She must apply

all of this income except for $44.10 per month to pay for the cost of her care at VanDuyn Home and Hospital. The remaining cost of her care is provided by Medicaid. She must use the $44.10 to meet her personal needs, including clothing, toiletries, and other personal needs and for Blue Cross-Blue Shield monthly payments.

5. She has no assets other than her regular Social Security checks.

6. Because of her limited income and resources, she is unable to pay the costs of this case, or give security therefor.

7. I believe my mother is entitled to redress in this action.

8. The nature of this case is briefly stated as follows:

On April 16, 1980, the United States Court of Appeals for the Second Circuit unanimously affirmed the decision and order of the United States District Court for the Northern District of New York dated November 29, 1979. The district court order granted a preliminary injunction, enjoining New York State Social Services officials from denying Medicaid to aged, blind and disabled individuals, based upon their prior transfer of assets. The order also denied Petitioner Blum's motion for summary judgment. Petitioner Blum is seeking a writ of certiorari in this court to review the determinations to grant the preliminary injunctions.

WHEREFORE, I respectfully request that an Order of this Court issue, granting respondents herein leave to proceed in this Court in forma pauperis, and for such other and further relief as this Court may deem just, equitable and proper.

John McCullough

Sworn to before me this
18th day of August 1980

MaryAnne Hanford
Commissioner of Deeds
Commission expires 12/31/80
Syracuse, New York,

MARY ANNE HANFORD
Commissioner of Deeds
City of Syracuse
Syracuse, New York
Commission Expires Dec. 31, 1980

MAY 13 1980

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1979
No. 79-

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ETHEL CALDWELL, individually and on behalf of all other persons similarly situated,

Respondent,

and

ELLA McCULLOUGH, JANET RICHMOND, AGNES GRANT and MURIEL ROTHSTEIN, as next friend of BELLE BARNETT, individually and on behalf of all other persons similarly situated,

Respondents,

and

JAMES L. COVERT, as Commissioner of the Madison County Department of Social Services, MADISON COUNTY, NEW YORK, JOHN L. LASCARIS, as Commissioner of the Onondaga County Department of Social Services, ONONDAGA COUNTY, NEW YORK, JOSEPH P. MENALDINO, as Commissioner of Warren County Department of Social Services, WARREN COUNTY, NEW YORK, ROBERT E. LAUNDREE, as Commissioner of the Essex County Department of Social Services, ESSEX COUNTY, NEW YORK, GABRIEL T. RUSSO, as Commissioner of the Monroe County Department of Social Services, MONROE COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ANITA PERITO and JAMES PERITO, individually and on behalf of all others similarly situated,

Respondents,

and

LOUIS FRIEDMAN,

Respondent,

and

BLANCHE BERNSTEIN, individually and as Commissioner of the New York City Department of Social Services,

Defendant.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

JENNIE LANDERS,

Respondent,

and

JOSEPHINE MANICCIA,

Respondent,

and

DAVID R. ADINOLFI, as Commissioner of the Cortland County Department of Social Services, CORTLAND COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

JULIA WHITLOCK,

Respondent,

and

ROBERT WAGNER, as Commissioner of the Tompkins County Department of Social Services, TOMPKINS COUNTY, NEW YORK,

Respondents.

AFFIDAVIT OF RESPONDENT
JANET RICHMOND IN SUPPORT
OF MOTION TO PROCEED
IN FORMA PAUPERIS

Janet Richmond being duly sworn deposes and says:

1. I am one of the named respondents in the above-entitled case. I am presently residing in the Tri-County Nursing Home, in North Creek, Warren County, New York, since I am unable to walk and require assistance with all bodily functions.

2. Because of my poverty I am unable to pay costs of said case or give security therefor. My only income is my social security check, which is paid directly to the Nursing Home, and a small distribution from a trust which over the past few years has been under thirty dollars ($30.00) per year. I do not own any property other than my personal clothing and effects and would not be able to remain in the nursing home were it not for the medical assistance I am presently receiving from the State.

3. I believe I am entitled to redress in said case.

4. The nature of said case is briefly stated as follows:

On April 16, 1980, the United States Court of Appeals for the Second Circuit unanimously affirmed the judgment of the United States District Court for the Northern District of New York dated November 29, 1979. The district court judgment granted preliminary injunctive relief enjoining New York Social Services officials administering New York's medical assistance (Medicaid) program from enforcing Social Services Law § 366.1(e), 18 N.Y.C.R.R. 360.8 and New York State Department of Social Services Administrative Directives 77 ADM-73 and 78 ADM-89 which law and directives would, if enforced, deny medical assistance benefits to those persons who have made voluntary transfers of property either prior to application or while receiving medical assistance.

Both courts held also that the respondents are likely to prevail on the merits in an action challenging New York's imposition of more restrictive medicaid eligibility conditions on medically needy persons than on categorically needy SSI recipients where the Social Security Act by its terms and as consistently interpreted by the courts of appeal, the Congress and the Department of Health, Education and Welfare, does not permit a state to impose more restrictive medicaid eligibility conditions on medically needy persons than on categorically needy SSI recipients.

Further, both courts held that respondents and the class of aged, blind or disabled persons would be irreparably injured by being completely disqualified for medicaid benefits

necessary to insure the provision of health care including hospital and skilled nursing facility care. The petitioner, Barbara B. Blum, Commissioner of the New York State Department of Social Services, is seeking a writ of certiorari in this court to review those determinations.

WHEREFORE, your deponent respectfully prays for an Order of this Court granting respondent herein leave to proceed in this Court informa pauperis, and for such other and further relief this Court may deem just, equitable and proper.

JANE GOODSPEED
Notary Public in the State of New York
appointed for Warren County
My Commission Expires Mar. 30, 19[illegible]

JANET RICHMOND

Sworn to before me this
12th day of May, 1980.

Notary Public

IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-2034

BARBARA BLUM, as Commissioner of the New York State Deparment of Social Services,

Petitioner,

v.

ETHEL CALDWELL, individually and on behalf of all other persons similarly situated,

Respondent,

and

ELLA MC CULLOUGH, JANET RICHMOND, AGNES GRANT and MURIEL ROTHSTEIN, and next friend of BELLE BARNETT, individually and on behalf of all other persons similarly situated,

Respondents,

and

JAMES L. COVERT, as Commissioner of the Madison County Department of Social Services, MADISON COUNTY, NEW YORK, JOHN L. LASCARIS, as Commissioner of the Onondaga County Department of Social Services, ONONDAGA COUNTY, NEW YORK, JOSEPH P. MENALDINO, as Commissioner of Warren County Department of Social Services, WARREN COUNTY, NEW YORK, ROBERT E. LAUNDREE, as Commissioner of the Essex County Department of Social Services, ESSEX COUNTY, NEW YORK, GABRIEL T. RUSSO, as Commissioner of the Monroe County Department of Social Services, MONROE COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ANITA PERITO and JAMES PERITO, individually and on behalf of all others similarly situated,

Respondents,

and

LOUIS FRIEDMAN,

Respondent,

and

BLANCHE BERNSTEIN, individually and as Commissioner of the New York City Department of Social Services,

Defendant.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

JENNIE LANDERS,

Respondent,

and

JOSEPHINE MANICCIA,

Respondent,

and

DAVID R. ADINOLFI, as Commissioner of the Cortland County Department of Social Services, CORTLAND COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

JULIA WHITLOCK,

Respondent,

and

ROBERT WAGNER, as Commissioner of the Tompkins County Department of Social Services, TOMPKINS COUNTY, NEW YORK,

Respondents.

AFFIDAVIT OF RESPONDENT
AGNES GRANT IN SUPPORT
OF MOTION TO PROCEED
IN FORMA PAUPERIS

AGNES GRANT, being duly sworn, deposes and says:

1. I am one of the named respondents in the above-entitled case.

2. I have no income except the $344.00 a month I receive from Social Security. Out of that I pay all my necessary expenses, including payments for Blue Cross and Blue Shield Insurance and Medicare. I also receive Medicaid, which is very important to me since I have very high bills every month for my medicine and drugs. I am 75 years old, and have difficulty walking as I suffer from arthritis and fluid retention.

3. I have been able to stay in my own home only because my relatives and friends come over regularly to help me and to take care of my needs.

My basic monthly expenses come to $315.50, without taking into consideration clothing, gifts or extras.

4. I have no assets other than my regular Social Security checks.

5. Because of my limited income and resources, I am unable to pay the costs of this case; or give security therefore.

6. I beleive I am entitled to redress in this action.

7. The nature of this case is briefly stated as follows:

On April 16, 1980, the United States Court of Appeals for the Second Circuit unanimously affirmed the decision and order of the United States District Court for the Northern District of New York dated November 29, 1979. The district court order granted a preliminary injunction, enjoining New York State Social Services officials from denying Medicaid to aged, blind, and disabled individuals, based upon their prior transfer of assets. The order also denied Petitioner Blum's motion for summary judgment. Petitioner Blum is seeking a writ of certiorari in this court to review the determinations to grant the preliminary injunction.

WHEREFORE, I respectfully request that an Order of this Court issue, granting Respondents herein leave to proceed in this Court in forma pauperis, and for such other and further relief as this Court may deem just, equitable, and proper.

Agnes Grant

Agnes Grant

Sworn to before me this
17th day of [illegible], 1980.

Notary Public

SUZANNE BAKER
Notary Public, State of New York
NO. 4928326
Qualified in Nassau County
Commission Expires March 30, 1982

IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-2034

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

-vs-

ETHEL CALDWELL, individually and on behalf of all other persons similarly situated,

Respondent,

and

ELLA McCULLOUGH, JANET RICHMOND, AGNES GRANT and MURIEL ROTHSTEIN, as next friend of BELLE BARNETT, individually and on behalf of all other persons similarly situated,

Respondents,

and

JAMES L. COVERT, as Commissioner of the Madison County Department of Social Services, MADISON COUNTY, NEW YORK, JOHN L. LASCARIS, as Commissioner of the Onondaga County Department of Social Services, ONONDAGA COUNTY, NEW YORK, JOSEPH P. MENALDINO, as Commissioner of Warren County Department of Social Services, WARREN COUNTY, NEW YORK, ROBERT E. LAUNDREE, as Commissioner of the Essex County Department of Social Services, ESSEX COUNTY, NEW YORK, GABRIEL T. RUSSO, as Commissioner of the Monroe County Department of Social Services, MONROE COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

-vs-

ANITA PERITO and JAMES PERITO, individually and on behalf of all others similarly situated,

Respondents,

and

LOUIS FRIEDMAN,

Respondent,

and

BLANCHE BERNSTEIN, individually and as Commissioner of the New York City Department of Social Services,

Defendant.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

-vs-

JENNIE LANDERS,

Respondent,

and

JOSEPHINE MANICCIA,

Respondent,

and

DAVID R. ADINOLFI, as Commissioner of the Cortland County Department of Social Services, CORTLAND COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

-vs-

JULIA WHITLOCK,

Respondent,

and

ROBERT WAGNER, as Commissioner of the Tompkins County Department of Social Services, TOMPKINS COUNTY, NEW YORK,

Respondents.

AFFIDAVIT OF MURIEL ROTHSTEIN, NEXT FRIEND OF RESPONDENT BELLE BARNETT, IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

MURIEL ROTHSTEIN, being duly sworn, deposes and says:

1. I have acted as next friend of Belle Barnett, one of the named respondents in this action, throughout the proceedings below. Belle Barnett has resided in a nursing home for several years and suffers from, among other things, senility.

2. The only income Belle Barnett has is her one-third share of a monthly social security check for her and her husband of $569.90, or $189.97. Under the medicaid program she is allowed to retain only $28.50 per month for all her non-medical needs (including legal expenses); the balance must be turned over to the nursing home to help pay for her care.

3. To my knowledge Belle Barnett has no assets whatsoever. A joint savings account which she had with her husband

was transferred by him into his own name; it was that transfer of property that led to her being initially denied medicaid and intervening in this action to obtain medicaid coverage. Her husband has recently suffered a stroke and is also currently a nursing home resident. Throughout this case he retained what savings he had to meet his own needs, and those savings will now be required for his care.

4. Because of the limited income and resources of Belle Barnett she is unable to pay the costs of this action or give security therefor.

5. I believe Belle Barnett is entitled to redress in this action.

6. The nature of this case is briefly stated as follows:

On April 16, 1980, the United States Court of Appeals for the Second Circuit unanimously affirmed the decision and order of the United States District Court for the Northern District of New York dated November 29, 1979. The district court order granted a preliminary injunction, enjoining New York State Social Services officials from denying Medicaid to aged, blind, and disabled individuals, based upon their prior transfer of assets. The order also denied Petitioner Blum's motion for summary judgment. Petitioner Blum is seeking a writ of certiorari in this court to review the determinations to grant the preliminary injunction.

WHEREFORE, I respectfully request that an Order of this Court issue, granting Respondents herein leave to proceed in this Court in forma pauperis, and for such other and further relief as this Court may deem just, equitable and proper.

Muriel E Rothstein
MURIEL ROTHSTEIN

Sworn to before me this
5th day of August, 1980

R H Reixach Jr

RENE H. REIXACH, JR.
NOTARY PUBLIC, State of New York
No. 8542715
Qualified in Monroe County
Commission Expires March 30, 1982

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979
NO.

----------X

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ETHEL CALDWELL, individually and on behalf of all other persons similarly situated,

Respondent,

and

ELLA MC CULLOUGH, JANET RICHMOND, AGNES GRANT, and MURIEL ROTHSTEIN, as next friend of BELLE BARNETT, individually and on behalf of all other persons similarly situated,

Respondents,

and

JAMES L. COVERT, as Commissioner of the Madison County Department of Social Services, MADISON COUNTY, NEW YORK, JOHN L.LASCARIS, as Commissioner of Onondaga County Department of Social Services, ONONDAGA COUNTY, NEW YORK, JOSEPH P. MENALDINO, as Commissioner of Warren County Department of Social Services, WARREN COUNTY, NEW YORK, ROBERT E. LAUNDREE, as Commissioner of the Essex County Department of Social Services, ESSEX COUNTY, NEW YORK, GABRIEL T. RUSSO, as Commissioner of the Monroe County Department of Social Services, MONROE COUNTY, NEW YORK,

Respondents.

----------X

BARBARA BLUM,individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ANITA PERITO and JAMES PERITO, individually and on behalf of all others similarly situated,

Respondents,

AFFIDAVIT OF AMELIA SCHENK IN SUPPORT OF RESPONDENT JAMES PERITO'S MOTION TO PROCEED IN FORMA PAUPERIS

and

LOUIS FRIEDMAN,

Respondent,

and

BLANCHE BERNSTEIN, individually and as Commissioner of the New York City Department of Social Services,

Respondent.

----------X

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

JENNIE LANDERS,

Respondent,

and

JOSEPHINE MANICCIA,

Respondent,

and

DAVID R. ADINOLFI, as Commissioner of the Cortland County Department of Social Services, CORTLAND COUNTY, NEW YORK,

Respondents.

----------X

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

JULIA WHITLOCK,

Respondent,

and

ROBERT WAGNER, as Commissioner of the Tompkins County Department of Social Services, TOMPKINS COUNTY, NEW YORK,

Respondents.

----------X

AMELIA SCHENK, being duly sworn, deposes and says:

1. I am a daughter of JAMES PERITO and the late ANITA PERITO, respondents in the above-captioned proceeding.

2. JAMES PERITO is bed-ridden and cannot attend to his own basic needs. He requires the services of a home attendant twenty four hours per day, seven days per week.

3. Because my father is physically incapacitated, he is unable to sign an affidavit in support of his motion to proceed in forma pauperis. I take care of his financial affairs which includes paying his bills and seeing that his needs are met. I am fully familiar with the facts stated herein.

4. Because of his poverty, my father is not able to pay costs of the above titled case or to give security therefor. After paying about $280.00 per month to the home attendant (the balance of the home attendant's salary is being paid by Medicaid), my father has only about $291.00 left from his Social Security benefit ($391.60) and his pension ($180.60) to meet his basic needs for food and other essentials. My father's attorney has informed me that an individual living alone in New York State who receives Supplemental Security Income (SSI) to supplement his other "unearned income" like Social Security and pensions has a total monthly income of $291.40.

5. I believe that my father ie entitled to redress in this case.

6. The nature of this case is briefly stated as follows:

On April 16, 1980, the United Stated Court of Appeals for the Second Circuit unanimously affirmed the order of the United States District Court for the Northern District of New York dated November 29, 1979, which granted a preliminary injunction restraining enforcement of New York Social Services Law §366(1)(e). Injunctive relief was granted on the ground that Social Services Law §366(1)(e), the "transfer of assets" restriction, violates the Social Security Act, 42 U.S.C. §1396a (a)(10)(C)(i). The preliminary injunction means that New York

Social Services officials who administer New York's federally financed medical assistance ("Medicaid") program cannot deny Medicaid to medically needy persons, like my father, who transferred property prior to applying for Medicaid. By denying Medicaid to people like my father, the Social Services officials had not applied eligibility standards to the medically needy aged, blind, and disabled people that were comparable to the standards applied to the categorically needy. Thus, the Social Services officials imposed more restrictive eligibility requirements upon the medically needy than upon the categorically needy in violation of 42 U.S.C. §1396a(a)(10)(C)(i). The petitioner, Barbara Blum, Commissioner of the New York State Department of Social Services, is seeking a writ of certiorari in this court to review those determinations.

WHEREFORE, your deponent respectfully prays for an Order of this Court granting respondent herein leave to proceed in this Court in forma pauperis, and for such other and further relief this Court may deem just, equitable and proper.

Amelia Schenk
AMELIA SCHENK

Sworn to before me this
29th day of May, 1980

CECIL H. STRAKER
Notary Public, State of New York
No. 24-4658145
Qualified in Kings County
Commission Expires March 30, 19 81

Cecil H. Straker
NOTARY PUBLIC

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ETHEL CALDWELL, individually and on behalf of all other persons similarly situated,

Respondent,

and

ELLA MC CULLOUGH, JANET RICHMOND, AGNES GRANT and MURIEL ROTHSTEIN, as next friend of BELLE BARNETT, individually and on behalf of all other persons similarly situated,

Respondents,

and

JAMES L. COVERT, as Commissioner of the Madison County Department of Social Services, MADISON COUNTY, NEW YORK, JOHN L. LASCARIS, as Commissioner of the Onondaga County Department of Social Services, ONONDAGA COUNTY, NEW YORK, JOSEPH P. MENALDINO, as Commissioner of Warren County Department of Social Services, WARREN COUNTY, NEW YORK, ROBERT E. LAUNDREE, as Commissioner of the Essex County Department of Social Services, ESSEX COUNTY, NEW YORK, GABRIEL T. RUSSO, as Commissioner of the Monroe County Department of Social Services, MONROE COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ANITA PERITO and JAMES PERITO, individually and on behalf of all others similarly situated,

Respondents,

and

LOUIS FRIEDMAN,

Respondent,

and

BLANCHE BERNSTEIN, individually and as Commissioner of the New York City Department of Social Services,

Defendant.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

JENNIE LANDERS,

Respondent,

and

JOSEPHINE MANICCIA,

Respondent,

and

DAVID R. ADINOLFI, as Commissioner of the Cortland County Department of Social Services, CORTLAND COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

JULIA WHITLOCK,

Respondent,

and

ROBERT WAGNER, as Commissioner of the Tompkins County Department of Social Services, TOMPKINS COUNTY, NEW YORK,

Respondents.

AFFIDAVIT OF RESPONDENT
JENNY LANDERS IN SUPPORT
OF MOTION TO PROCEED
IN FORMA PAUPERIS

JENNY LANDERS, being duly sworn, deposes and says:

1. I am one of the named respondents in the above-entitled case. I currently reside in Highgate Manor Nursing Home, 28 Kellogg Road, Cortland, New York in that facility's skilled nursing unit.

2. I have been in this facility since December 31, 1979, when I was transferred here from Wilson Memorial Hospital's extended care facility in Johnson City, New York. I am bedridden and unable to care for myself.

3. The current cost of my care at Highgate Manor Nursing Home is in excess of $1,400.00 per month.

4. I have no income aside from the $340.10 in Social Security benefits I receive each month. I must apply all of this income except for $29.10 per month to pay for the cost of my care

in this nursing home. The remaining cost of my care is provided for by Medicaid. I must use the $29.10 per month to meet my personal needs, including clothing, toiletries, and other personal needs.

5. I have no assets other than my regular Social Security checks.

6. Because of my limited income and resources, I am unable to pay the costs of this case, or give security therefor.

7. I believe I am entitled to redress in this action.

8. The nature of this case is briefly stated as follows:

On April 16, 1980, the United States Court of Appeals for the Second Circuit unanimously affirmed the decision and order of the United States District Court for the Northern District of New York dated November 29, 1979. The district court order granted a preliminary injunction, enjoining New York State Social Services officials from denying Medicaid to aged, blind, and disabled individuals, based upon their prior transfer of assets. The order also denied Petitioner Blum's motion for summary judgment. Petitioner Blum is seeking a writ of certiorari in this court to review the determinations to grant the preliminary injunction.

WHEREFORE, I respectfully request that an Order of this Court issue, granting Respondents herein leave to proceed in this Court in forma pauperis, and for such other and further relief as this Court may deem just, equitable, and proper.

J Landers

Jennie Landers

Sworn to before me this
29 day of May, 1980.

Carol C Morgan

Notary Public

CAROL C. MORGAN
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN CORTLAND CO. #4693335
MY COMMISSION EXPIRES MARCH 30, 19 81

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979
NO. 79-

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ETHEL CALDWELL, individually and on behalf of all other persons similarly situated,

Respondent,

and

ELLA MC CULLOUGH, JANET RICHMOND, AGNES GRANT and MURIEL ROTHSTEIN, as next friend of BELLE BARNETT, individually and on behalf of all other persons similarly situated,

Respondent,

and

JAMES L. CONERT, as Commissioner of the Madison County Department of Social Services, MADISON COUNTY, NEW YORK, JOHN L. LASCARIS, as Commissioner of the Onondaga County Department of Social Services, ONONDAGA COUNTY, NEW YORK, JOSEPH P. MENALDINO, as Commissioner of Warren County Department of Social Services, WARREN COUNTY, NEW YORK, ROBERT E. LAUNDREE, as Commissioner of the Essex County Department of Social Services, ESSEX COUNTY, NEW YORK, GABRIEL T. RUSSO, as Commissioner of the Monroe County Department of Social Services, MONROE COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

ANITA PERITO and JAMES PERITO, individually and on behalf of all others similarly situated,

Respondents,

and

LOUIS FRIEDMAN,

Respondent,

LESLIE H. COHEN
ATTORNEY AT LAW
301 CORTLAND
SAVINGS BANK BLDG.
CORTLAND, N.Y. 13045

and

BLANCHE BERNSTEIN, individually and as Commissioner of the New York City Department of Social Services,

Defendant.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

JENNIE LANDERS,

Respondent,

and

JOSEPHINE MANICCIA,

Respondent,

and

DAVID R. ADINOLFI, as Commissioner of the Cortland County Department of Social Services, CORTLAND COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

v.

JULIA WHITLOCK,

Respondent,

and

ROBERT WAGNER, as Commissioner of the Tompkins County Department of Social Services, TOMPKINS COUNTY, NEW YORK,

Respondents.

JOSEPHINE MANICCIA being duly sworn deposes and says:

1). I am one of the Respondents in the above entitled case and make this affidavit in my own behalf. I presently reside in the Highgate Nursing Home in the City of Cortland, County of Cortland and State of New York.

LESLIE H. COHEN
ATTORNEY AT LAW
100 CORTLAND
SAVINGS BANK BLDG.
CORTLAND, N.Y. 13045

2). I am financially unable to pay the cost of this case or give any security therefore. I receive $209.70 per month from Social Security. I pay $200.00 a month as a chronic payment to the Highgate Nursing Home for my maintance at that facility. My husband, Augusto Maniccia, receives $314.20 a month from Social Security but he is required to expend all of that money for his own living expenses in our family home where he resides currently. Monthly payments for utilities, phone, food, City taxes, Schoold taxes and fire insurance far exceed the Social Security income of my husband on a monthly basis.

3). I believe we are entitled to redress in this case.

4). The nature of the case is briefly as follows. New York law requires that an applicant for medical assistance not voluntarily transfer an asset for the purpose of qualifying for eligibility to receive such assistance. Any transfer made within 18 months of application is presumed to have been made for the purpose of qualifying only. In this action, I seek to have such statute be declared unconstitutional and seek to enjoin the State of New York from enforcing this statute against me. I believe that the cause of action is both meritorious and legally sound and I ask that this court grant my request.

WHEREFORE, your deposent respectfully prays for an order of this court granting Respondent leave to proceed in this court in-forma pauperis, and for such other and further relief as may be just.

Josephine Maniccia
JOSEPHINE MANICCIA

Sworn to before me this 23rd day of May, 1980.

Notary Public

LESLIE H. COHEN
ATTORNEY AT LAW
100 COURTLAND
SAVINGS BANK BLDG.
CORTLAND, N.Y. 13045

NO. 79-2034

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

-vs-

ETHEL CALDWELL, individually and on behalf of all other persons similarly situated,

Respondent,

and

ELLA McCULLOUGH, JANET RICHMOND, AGNES GRANT and MURIEL ROTHSTEIN, as next friend of BELLE BARNETT, individually and on behalf of all other persons similarly situated,

Respondents,

and

JAMES L. COVERT, as Commissioner of the Madison County Department of Social Services, MADISON COUNTY, NEW YORK, JOHN L. LASCARIS, as Commissioner of the Onondaga County Department of Social Services, ONONDAGA COUNTY, NEW YORK, JOSEPH P. MENALDINO, as Commissioner of Warren County Department of Social Services, WARREN COUNTY, NEW YORK, ROBERT E. LAUNDREE, as Commissioner of the Essex County Department of Social Services, ESSEX COUNTY, NEW YORK, GABRIEL T. RUSSO, as Commissioner of the Monroe County Department of Social Services, MONROE COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

-vs-

ANITA PERITO and JAMES PERITO, individually and on behalf of all others similarly situated,

Respondents,

and

LOUIS FRIEDMAN,

Respondent,

and

BLANCHE BERNSTEIN, individually and as Commissioner of the New York City Department of Social Services,

Respondent.

BARBARA BLUM, individually and as Commissioner of the New York State Department of Social Services,

Petitioner,

-vs-

JENNIE LANDERS,

Respondent,

and

JOSEPHINE MANICCIA,

Respondent,

and

DAVID R. ADINOLFI, as Commissioner of the Cortland County Department of Social Services, CORTLAND COUNTY, NEW YORK,

Respondents.

BARBARA BLUM, as Commissioner of the New York State Department of Social Services,

Petitioner,

-vs-

JULIA WHITLOCK,

Respondent,

and

ROBERT WAGNER, as Commissioner of the Tompkins County Department of Social Services, TOMPKINS COUNTY, NEW YORK,

Respondents.

BRIEF FOR RESPONDENTS ELLA McCULLOUGH, JANET RICHMOND, AGNES GRANT, BELLE BARNETT, JAMES PERITO, JENNIE LANDERS, AND JOSEPHINE MANICCIA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RENE H. REIXACH, ESQ.
Greater Upstate Law Project
80 West Main Street
Rochester, New York 14614
Tel: 716-454-6500
Counsel of Record for Respondents Ella McCullough, Janet Richmond, Agnes Grant, Belle Barnett, James Perito, Jennie Landers and Josephine Maniccia

NANCY E. LeBLANC, ESQ.
North County Legal Services
P.O. Box 38
Upper Jay, New York 12987
Tel: 518-946-2151
Counsel for Respondent
Agnes Grant

JOHN CHIPMAN GRAY, JR., ESQ.
Brooklyn Legal Services Corp. B
105 Court Street
Brooklyn, New York 11201
Tel: 212-855-8003
Counsel for Respondent
James Perito

TOBY GOLICK, ESQ.
Legal Services for the Elderly
132 West 43rd Street
New York, New York 10036
Tel: 212-391-0120
Counsel for Respondent
James Perito

TABLE OF AUTHORITIES

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STATEMENT OF THE CASE

Respondents* will not restate the facts or proceedings below, with but one exception. Petitioner's history of the proceedings below omits two significant rulings in this Court in this case: the opinion of Mr. Justice Marshall as Circuit Justice on May 6, 1980 denying a stay, and the subsequent denial by the full Court by order dated June 2, 1980, of Petitioner's renewed application for a stay. Docket no. A-946. Significantly, the renewed application was premised on the decision in Dawson v. Myers, No. 79-3246 (9th Cir. May 14, 1980), rehearing denied July 30, 1980, which conflicted with the decisions below. This conflict is also the principal reason Petitioner now urges for review of this case.

SUMMARY OF ARGUMENT

The order sought to be reviewed is not a final judgment but merely a preliminary injunction. In addition, the actions of Petitioner and of the Congress may cause the order below to abate before review could be completed by this court. The rulings below are in accord with the consistent positions of the Department of Health and Human Services (formerly the Department of Health, Education and Welfare) and with the legislative intent of the Social Security Act.

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* As set forth in the Petition (p.5 fn.), several respondents, plaintiffs or plaintiffs-intervenors below have died. In addition to those listed in the Petition, respondent Louis Friedman has also died.

REASONS FOR DENYING THE WRIT

I.

THE PRELIMINARY INJUNCTION SOUGHT TO BE REVIEWED IS OF UNCERTAIN DURATION AND NOT SUFFICIENTLY FINAL

The status of the preliminary injunction which Petitioner seeks to have reviewed is in a state of flux and should not be reviewed by this Court. Petitioner has notified the Department of Health and Human Services [HHS] (formerly Health, Education and Welfare) that New York is cancelling the contract whereby HHS determines medicaid eligibility for SSI recipients. This cancellation is scheduled to take effect August 29, 1980, more than a month before the Petition could even be acted upon and close to a year before the case would be likely to be determined on the merits (Petition, pp. A-56 to A-58).

If the cancellation of that contract goes into effect the nexus between the eligibility criteria for the Supplemental Security Income (SSI) program and the medically needy program which was the underpinning of the decisions below (See Petition, pp. 5, 7) will have abated before the case can be heard. As the letter of cancellation makes clear, the purpose of cancellation is so that New York could reinstate its transfer of assets rule (Petition, p. A-57). Petitioner has made a motion in the district court to modify the injunction herein to allow reinstatement of that rule once the contract cancellation takes effect. Petitioner's right to reinstate her transfer of assets rule is being contested in the district court.* How, or when, that court will rule, or how (or when) any appeals from that ruling might be

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* Respondents note, however, that the legality of any such reinstated rule would be determined, in part, by the same sort of "comparability" analysis pursued by the courts below.

determined remains to be seen. Presumably, if the district court does not grant Petitioner's motion to modify the injunction to permit reinstatement of the transfer of assets rule, the cancellation of the contract might be revoked since its stated purpose would have been thwarted. All that can be said with assurance is that the status of the injunction below is, and will be for some time, uncertain.*

Petitioner will not be deprived of her chance for ultimate review of the issues determined below if the Petition is denied. She will have a second chance after final judgment is entered and the self-inflicted uncertainty caused by her attempts to change the status of New York's medicaid program has been resolved. She will also have the opportunity to seek review from any final adverse rulings in various proceedings in the state courts which reached a result identical to that of the courts below, e.g. Scarpuzza v. Blum, 73 A.D.2d 237, 426 N.Y.S.2d 505 (2d Dept. 1980), motion for leave to appeal granted ____ N.Y.2d ____ (July 3, 1980).

The Petition should be denied because of the uncertainty which Petitioner's own maneuverings have created about whether there will be anything left to review.

II.

THE ORDER BELOW IS IN ACCORD WITH SETTLED LAW

Petitioner seeks to justify review of the order below by

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* Additionally an action has just been filed seeking to preliminarily and permanently enjoin the entire proposed conversion of New York's medicaid program. Morabito v. Blum, No. 80 Civ. 4584 RJW (S.D.N.Y.).

pointing out that it conflicts with the decision in Dawson v. Myers, No. 79-3246 (9th Cir. May 14, 1980), rehearing denied July 30, 1980 [Petition, A-9 & A-10]. The simple fact is that such conflict as exists is between the decision in Dawson and every other federal court* which has considered the matter, as well as between Dawson and the regulations and policies of the Department of Health and Human Services; if any review is required it is not review of this case.

The concept of "comparability" accepted by the courts below as the basis for their rulings has been followed by every court to address the question prior to Dawson, including two prior cases against Petitioner's predecessors in office. Greklek v. Toia, 565 F.2d 1259 (2d Cir. 1977), cert. denied sub nom. Blum v. Toomey, 436 U.S. 962 (1978); Aitchison v. Berger, 404 F.Supp. 1137 (S.D.N.Y. 1975), aff'd 538 F.2d 307 (2d Cir. 1976), cert. denied 429 U.S. 890 (1976).

The decision below is also in accord with the position of the Department of Health and Human Services both in its formal regulation, 42 C.F.R. §435.401, and its advice to the several states referred to in the decision below (Petition, A-20, A-69).

The court of appeals below likewise recognized (Petition A-38), as did the Dawson court (Petition, p. A-70), that Congress has repeatedly stated that under current law transfer of assets rules in states like New York are illegal.** The legislative history of the 1973 Social Security Act Amendments is also in

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* Since the Petition was filed the district court in Massachusetts has agreed with the courts below that a transfer of assets rule in a state with an agreement for the Social Security Administration to determine medicaid eligibility for SSI recipients is illegal. Robinson v. Pratt, Civil no. 79-1278-S (D. Mass. June 24, 1980) [copy annexed].

** Most recently the House has joined the Senate in taking that view. House Rep. No. 96-589, Part 2, 96th Cong. 2d Sess., April 23, 1980, to accompany H.R. 4000, the Medicare and Medicaid Amendments of 1980, p.76.

accord with the decision below. At HEW's suggestion [38 Fed. Reg. 32216 (Nov. 21, 1973)] the Act was amended to "coordinate the medicaid program with the SSI program." 119 Cong. Rec. H11957 (Dec. 21, 1973). Petitioner's request for relief should be addressed to Congress, not to the Court. Cf. Philbrook v. Glodgett, 421 U.S. 707, 719 (1975).*

CONCLUSION

For the reasons stated the petition for a writ of certiorari should be denied.

Dated: August 19, 1980

RESPECTFULLY SUBMITTED,

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* Provisions permitting states to impose transfer of assets rules under certain conditions are incorporated in both the Senate and House versions of the "reconciliation" bill required to be enacted this fall as part of the budgetary process. S.2885, §511; H.R. 7765, §333.

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SADIE ROBINSON, Plaintiff, v. JOHN PRATT, ET AL., Defendants.	*	CIVIL ACTION NO. 79-1278-S

MEMORANDUM AND ORDER

June 24, 1980

SKINNER, D.J.

The original plaintiff, an eighty-three year old woman, sought to enjoin the application of the Massachusetts medical assistance program's "transfer of assets" provision, M.G.L.A. c.118E §13, 106 C.M.R. 325.060(C)(1979),[1] to her and other persons similarly situated, alleging that to the extent that it operates to deny her medical assistance benefits (Medicaid) it violates the Equal Protection Clause of the Fourteenth Amendment and is in conflict with Title XIX of the Social Security Act, 42 U.S.C. §1396 et seq. On July 10, 1979, I issued a temporary restraining order which prevented defendant Pratt from denying Medicaid benefits to the plaintiff on the basis of this provision. Plaintiff amended her complaint to add the Secretary of Health and Human Services and seeks to compel her to enforce her Department's regulations with respect to the Massachusetts

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[1] The regulation provides:

> Transfer of Real or Personal Property
>
> MA (Medical Assistance) shall not be granted to an applicant who, at any time within one year immediately prior to the filing of an application for MA, has made an assignment or transfer of real or personal property so as to render himself eligible for such assistance.

Plaintiff's challenge applies both to the regulation and its statutory counterpart.

provision. 42 U.S.C. §§1396a(b), 1396a(c)(1976). Jurisdiction is predicated on 28 U.S. §§1331, 2201-2202 (1976), and the case is currently before me on plaintiff's motions for summary judgment, Fed.R.Civ.P. 56, and class certification, Fed.R.Civ.P. 23(b)(2). The Secretary has moved to dismiss pursuant to Fed.R.Civ.P. 12(b)(6).

The case of the original plaintiff is now moot. The transfer of assets which disqualified her under the Massachusetts rule occurred on April 20, 1979. The disqualification expired on April 20, 1980. Accordingly, the case as to Sadie Robinson is DISMISSED as moot. Similarly, the intervenors John N. Brown and Jane Brown were denied eligibility because of a purchase of an automobile (an exempt item) on May 22, 1979. Their claim must also be DISMISSED as moot. 106 C.M.R. 325.060(C)(1979).

The transfer said to disqualify the intervenor George Sweeney, however, occurred on December 3, 1979, and he is still disqualified from receiving Medicaid. Mr. Sweeney's case not only represents a harsh application of the rule, but also dramatically demonstrates the unequal treatment of which the plaintiff complains. The disqualifying payment was made from their joint account by plaintiff's wife, without the knowledge of the plaintiff, who is suffering from senile dementia. It disqualifies the plaintiff from receiving Medicaid but does not disqualify Mrs. Sweeney from receiving Supplementary Security Income (SSI). He seeks a temporary restraining order preventing the defendant from withholding Medicaid because of his alleged "transfer of assets".

Title XIX of the Social Security Act, 42 U.S.C. §1396 et seq. (1976), provides the framework for a comprehensive cooperative federal-state medical assistance program. A state intially becomes eligible for federal funds upon submission of a medical assistance benefits plan which fulfills the requirements of the statute, 42 U.S.C. §1396a(a)(1976), and receives the approval of the Secretary. 42 U.S.C. §1396a(b)(1976).

Once a state decides to participate in the Medicaid program it may tailor its particular plan to its own resources and needs within federally defined limits. For example, the Title XIX state plan must make Medicaid benefits available to all individuals who are aged, blind, or disabled, the so-called "categorically needy", 42 U.S.C. §1396a(a)(10)(A)(1976); 42 C.F.R. §435.4 (1979). The state may, however, define the categorically needy to include all persons who receive SSI, 42 U.S.C. §1396a(a)(10)(A)(1976), or it may use more restrictive eligibility conditions. 42 C.F.R. §435.121 (1979). If the state elects this latter option, its requirements may be no more restrictive than those in effect under the state's Medicaid plan on January 1, 1972 and, in determining an individual's financial eligibility, the state must deduct any SSI payments received by that individual. 42 C.F.R. §435.121(b)(1)(2)(1979).

In addition to the mandatory coverage of the categorically needy individuals, states may extend Medicaid to other groups of individuals who would otherwise be eligible for Medicaid benefits but whose income and resources are above the limits for the

categorically needy; within the context of this case, these individuals comprise the "medically needy" group. 42 U.S.C. §1396a(a)(10)(C)(1976); 42 C.F.R. §435.4 (1979). If the state desires to extend benefits to "medically needy" individuals its administering agency "must not use requirements for determining [medically needy] groups that are . . . for the aged, blind, and disabled individuals, more restrictive than those used under SSI, except for individuals receiving an optional state supplement . . . or individuals [subject to the more restrictive requirements] as allowed by 42 C.F.R. §435.121."[2]

Massachusetts has elected to participate in the Medicaid program and to extend coverage to the medically needy as well as categorically needy groups. M.G.L.A. c.118E §1 (1979). In providing Medicaid coverage for the aged, blind, and disabled, Massachusetts has chosen to make all SSI recipients automatically eligible for benefits (the "categorically needy"), and to extend benefits to others who would otherwise be eligible for benefits "but for income and resources, provided they meet the requirements of financial eligibility . . ." as set forth in the statute. One such requirement is the "transfer of assets" provision. M.G.L.A. c.118E §13 (1973); 106 C.M.R. 325.060(C)(1979).

Plaintiff contends, inter alia, that the Massachusetts transfer of assets rule is in conflict with Title XIX and the applicable HHS regulations in that it creates

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[2] Because of the manner in which Massachusetts has chosen to determine eligibility and administer its optional state supplement plan, these latter two exceptions do not apply to the Massachusetts plan.

additional eligibility requirements not authorized by the Medicaid statutory scheme. The Act requires states, which have chosen to include groups other than categorically needy groups, to make benefits available to individuals who would, except for their income and resources, be eligible for SSI benefits and who have insufficient income and resources for covered medical care. Insufficiency of income must be determined in accordance with standards which are "comparable" to the standards used in determining eligibility for SSI. 42 U.S.C. §1396a(a)(10)(C)(i)(1976).

Plaintiff argues that a transfer of assets would not preclude him from SSI benefits, Social Security Administration's Claims Manual §12507(a), and that Massachusetts' use of it to render him ineligible for Medicaid is in violation of the statute. Defendant argues that the transfer of assets provision serves the justifiable state purpose of preventing individuals from fraudulently obtaining Medicaid benefits and guarding the scarce welfare resources of the Commonwealth. Alternately, defendant argues that the provision be treated as a collateral restriction designed to police fraud.

I may not consider plaintiff's claim under the statute and regulations in the absence of a non-frivolous constitutional claim under the Equal Protection Clause of the Fourteenth Amendment. Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979). While I am not now as sanguine as I was on July 10, 1979 about the plaintiff's likelihood of success on the merits, I conclude that

his constitutional claim is genuine, colorable, and not frivolous. I must proceed to consideration of the statutory claims before reaching the constitutional one. Rosado v. Wyman, 397 U.S. 397 (1970).

The Courts of Appeal of the Second and Fourth Circuits have held that disqualification from Medicaid by reason of a prior transfer of assets is in conflict with the federal statutes and regulations referred to above. Caldwell v. Blum, ___ F.2d ___, (2d Cir., No. 79-7864, April 16, 1980); Fabula v. Buck, 598 F.2d 869 (4th Cir. 1979). Accord, Buckner v. Maher, 424 F.Supp. 366 (D. Conn. 1976), aff'd 434 U.S. 898 (1977).

The Court of Appeals for the Ninth Circuit has taken a contrary view, holding that imposing the transfer of assets disqualification on Medicaid applicants does not violate the statutes, because the mandate to employ "comparable" standards of income does not mean "the same" standards. Dawson v. Myers, ___ F.2d ___ (9th Cir., No. 79-3246, May 14, 1980).[3]

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[3] In the District Court, Judge Lucas held that the no-transfer rule was not a standard of eligibility, but a collateral restriction designed to police fraud. The Court of Appeals rejected this view. If the transfer of assets was clearly keyed to a fraudulent intent by the terms of the regulation, I have no doubt that it could be sustained as a collateral restriction, but the Massachusetts' regulation is not so restricted. D.C. Central Dist. Cal., No. 78-2350, sub nom. Dawson v. Beach.

I adopt the reasoning of Judge Mansfield in Caldwell v. Blum, supra, and hold that the disqualification from Medicaid by reason of a prior transfer of assets violates the comparability provision of 42 U.S.C. §1396a(a)(10)(C)(1976) and the attendant regulation, 42 C.F.R. §435.401(c)(1979).

The next question concerns the function of the courts in administering and enforcing these provisions, a problem not addressed by any of the courts cited above. 42 U.S.C. §1396c grants enforcement powers to the Secretary of HHS:

> §1396c. Operation of State plans
>
> If the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of the State plan approved under this subchapter, finds -
>
> (1) that the plan has been so changed that it no longer complies with the provisions of section 1396a of this title; or
>
> (2) that in the administration of the plan there is a failure to comply substantially with any such provision;
>
> the Secretary shall notify such State agency that further payments will not be made to the State (or, in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure), until the Secretary is satisfied that there will no longer be any such failure to comply. Until he is so satisfied he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure). [Emphasis supplied].

It appears from the opinion in Dawson v. Myers, supra, that several regional administrators of HHS have expressed disapproval of no-transfer rules in letters to state welfare departments. In her brief in this case, the Secretary informs me that she has

informed the Massachusetts Department of Welfare that it is not in compliance with federal law because of the no-transfer rule. She says, however, that imposition of sanctions under §1396(c) is discretionary so that there is no basis for the issuance of a writ of mandamus against her. The emphasized language in parentheses in the quoted provision bears out this contention. I agree that a writ of mandamus against the Secretary should not be issued.

The Secretary goes farther, however, and suggests that the court has some power to grant more effective relief and to save her from the pain of decisionmaking. In her brief she asserts the following:

> The drastic sanction of withholding Federal payments under 42 U.S.C. 1396c also is an indirect sanction. The Secretary withholds further payments "until the Secretary is satisfied that there will no longer be any such failure to comply". The Secretary cannot compel compliance. If this Court is so inclined, it can give plaintiff the relief she seeks by issuing an order directly against the State defendant; and this would be a far more appropriate means of removing the challenged transfer-of-property restriction from the Massachusetts Medicaid program.
>
> * * * *
>
> Plaintiff has no standing to invoke this Federal provision before this Court, and the relief requested with respect to the Secretary would not achieve the desired change in State policy. (Such a change could be obtained far more easily by an order of this Court directly against State officials.) [Emphasis supplied].

Memorandum of Defendant Harris in Support of Motion to Dismiss at 10.

I am at a loss to discover what remedy the Secretary thinks the court can impose other than offering the state the option of complying or losing the benefit of federal participation. That is precisely what the Secretary is authorized to do. It is clear, furthermore, that the Congress intended the imposition of sanctions, the form of sanctions and relief from sanctions to be committed to the discretion of the Secretary.

It is equally clear that compliance with 42 U.S.C. §1396a(a)(10)(C)(1976) is not mandated as a rule of law to be enforced by the courts, but is mandated only as a condition of federal participation in a Medicaid program.

The enforcement of this statute has not been committed to the courts to be executed through private right of action. Such judicial enforcement would interfere with the discretion expressly vested in the Secretary. I perceive her invitation to the court to intervene as a total distortion of the statutory scheme and as an attempt to avoid a thorny political decision, i.e., an abdication of responsibility.

There is much pressure on our courts to find a remedy for every wrong, to fill vacuums in political and executive leadership. The temptation to intervene is strong. To do so, however, is only to encourage further abdication.

If the Secretary had forthrightly said that she was staying her hand in the exercise of executive

discretion, and urged this court to back off, I would have no quarrel with her. I take issue with her attempt to get the court to do a disagreeable part of her job in disregard of the functional structure of the applicable statute.

In my opinion, the statute does not create a private right of enforcement or authorize the interference by the court in the executive discretion of the Secretary to administer sanctions created by §1396c. Accordingly, I decline to enter any injunction or restraining order based on the federal statute or regulations. The plaintiff's motion for a temporary restraining order is DENIED.

The constitutional issues have not been briefed or argued, however, and I shall retain jurisdiction of the case for the purpose of resolving the constitutional issues raised by the intervenor's complaint.

United States District Judge

CERTIFICATE OF SERVICE

RENE H. REIXACH, JR., counsel of record for respondents on whose behalf this brief is filed, hereby certifies:

I am a member of the Bar of this Court. On the 19th day of August, 1980, I served the annexed motion for leave to proceed in forma pauperis, affidavits in support thereof and brief in opposition to petition for writ of certiorari upon counsel for petitioner and all respondents not represented by the undersigned, as set forth on the annexed list, by depositing true copies thereof, first class postage prepaid, in sealed wrappers addressed to each at his or her respective address shown thereon, in an official depository maintained by the United States Postal Service. All persons required to be served have been served.

Dated: August 19, 1980

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